Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in movie theaters with 300 or fewer seats, wheelchair seating located amidst or adjoining general public seating and providing unobstructed views of the screen complies with the Americans with Disabilities Act and the "lines of sight comparable" component of Section 4.33.3 of its enabling regulations?

2. Whether a court should accord "controlling deference," or any deference, to an administrative agency's after-the-fact interpretation of a regulation, when the interpretation imposes new obligations not clear from the face of the regulation, and is adopted without the notice and comment procedures contemplated by the Administrative Procedure Act?

3. Whether an administrative agency's after-the-fact interpretation of a regulation that imposes new obligations not clear from the face of the regulation, and is adopted without the notice and comment procedures contemplated by the Administrative Procedure Act, may be enforced retroactively?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding whose judgment is sought to be reviewed are Regal Cinemas, Inc., Eastgate Theatre, Inc., Kathy Stewmon, Tina Smith, and Kathy Braddy. Oregon Paralyzed Veterans of America, a plaintiff below, is no longer a party to this proceeding.

Petitioners, Regal Cinemas, Inc. and Eastgate Theatre, Inc., are both ultimately owned by Regal Entertainment Group, which is publicly traded.

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Petitioners, Regal Cinemas, Inc. and Eastgate Theatre, Inc. (collectively "Regal"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on August 13, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), and is reprinted in the Appendix to this Petition ("App.") at App. 1a. The opinion of the United States District Court for the District of Oregon (King, J.), which was reversed by the Ninth Circuit, is reported at *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001), and is reprinted at App. 27a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 13, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2000).

STATUTES INVOLVED

Pertinent provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000), and the Americans with Disabilities Act Accessibility Guidelines, 28 C.F.R. pt. 36, app. A (2003), are set forth at App. 40a.

STATEMENT OF THE CASE

The decision below creates conflict among the circuits on a matter of federal law and puts builders, owners, and operators of places of public accommodation across the nation "in a position of impossible uncertainty." *Stewmon*, 339 F.3d at 1134, App. 18a (Kleinfeld, J., dissenting). As acknowledged in both the majority and dissenting opinions, the decision below directly conflicts with the United States Court of Appeals for the Fifth Circuit's holding in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), regarding an interpretation of Title III of the ADA and its enabling regulations. *See Stewmon*, 339 F.3d at 1133 n.9, App. 15a (B. Fletcher, J.); *id.* at 1133, App. 18a (Kleinfeld, J., dissenting).

Prior to the popularization of stadium-style movie theaters, most movie theaters relied on gently sloping floors to provide theater-goers with (sometimes less than clear) sightlines over forward sitting patrons. Wheelchair spaces in traditional style theaters were typically located at the rear of the auditorium, near the entrance. This location was considered ideal because the accessibility regulations require that wheelchair spaces must, for safety reasons, be located on a level surface with accessible egress.

In 1995, one of Regal's competitors opened the first stadium-style movie theater. Stadium-style design theaters eliminate "obstructed view" problems that occur, for example, when a tall individual sits in front of a shorter person. In most of the theater, the incline required to provide completely unobstructed sightlines is well over five percent, far greater than what can reasonably be accomplished with a sloped floor. Steps are therefore inherent to the stadium design. As with traditional slope theaters, wheelchair spaces in stadium style theaters are located on level floor, near the entrance, and adjoining an accessible route. All wheelchair seating locations in stadium-style theaters, like the seats for the general public, provide clear and unobstructed views of the movie screen, and either adjoin or are amidst seating for the general public.

As stadium-style movie theaters gained in popularity with the theater-going public, Regal, and virtually every other major movie theater operator, responded to the demand by building stadium-style multiplexes. Between 1995 and July of 1998, hundreds of similarly designed stadium-style movie theaters were built, inspected, and opened for business.

The underlying lawsuit challenged the placement of wheelchair seating locations in six Regal "stadium-style" movie theater multiplexes in the Portland, Oregon area as violating Section 4.33.3 of the ADA Accessibility Guidelines. The district court below granted summary judgment in favor of Regal. *OPVA*, 142 F. Supp. 2d at 1294, App. 27a. The DOJ appeared as *amicus curiae* on appeal in the Ninth Circuit, urging deference to an interpretation of Section 4.33.3 that would impose, among

other things, new "viewing angle" standards for wheelchair seating locations.[1] The DOJ argued that viewing angles for wheelchair seating must be "equivalent or better than the viewing angles [provided] . . . to a majority" of the public. Relying on the DOJ's interpretation, a divided Ninth Circuit reversed the district court and remanded the case with instructions to enter summary judgment against Regal. The Ninth Circuit thereby imposed construction obligations not found in the language, history, or past application of the regulation. The majority opinion means that thousands of movie theaters that were built without notice of the DOJ's interpretation, and in compliance with the law according to the best knowledge of design professionals at the time, must now be destroyed or expensively retrofitted.

The decision below also creates and perpetuates conflict among the lower courts regarding the degree of deference, if any, that should be given to an agency's after-the-fact interpretation of a regulation when the interpretation imposes new obligations not clearly articulated in the language of the regulation and is adopted without following notice and comment procedures. The conflict reflects a fundamental, persistent, and recurring problem that necessarily transcends any single statute or regulatory scheme.

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1. While the ADAAG was promulgated in 1991, the DOJ did not announce its interpretation of Section 4.33.3 until July of 1998. Between 1991 and July 1998, the DOJ never indicated that Section 4.33.3 could be interpreted to impose a "viewing angle" requirement in small assembly areas of 300 seats or less. The Ninth Circuit majority described DOJ's interpretation as requiring theaters to "provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons." *Stewmon*, 339 F.3d at 1130, App. 10a-11a. The Access Board previously described DOJ's interpretation as requiring viewing angles for wheelchair seating that must be "equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold." *See* ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,278, App. 47a-48a (Nov. 16, 1999) (codified at 36 C.F.R. pt. 1190 & 1191).

A. Title III Of The ADA And The ADA Accessibility Guidelines.

Title III of the ADA requires that places of public accommodation meet certain accessibility design guidelines. Accessible design implicates fundamental structural, architectural, engineering, and safety considerations that must be addressed well before construction begins. One court concisely described why:

> Constructing a stadium or arena is an expensive, complex affair. If the law is to impose certain requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations.

Caruso v. Blockbuster-Sony Music Entm't Ctr., 968 F. Supp. 210, 216 (D.N.J. 1997), *aff'd in relevant part*, 193 F.3d 730 (3d Cir. 1999).

Both the language and legislative history of Title III evidence Congress's intent that builders, owners, and operators of places of public accommodation receive full and fair notice of what is required under the law. Congress instructed the DOJ to set accessibility standards "consistent with the minimum guidelines and requirements issued by the [Access Board]." 42 U.S.C. § 12186(c), App. 41a.[2] Notice was so important that Congress set a deadline for the DOJ to enact regulations so that builders, owners, and operators would have significant advance notice of their construction obligations. *See* 42 U.S.C. § 12186(d)(1), App. 41a-42a.

The Access Board developed the underlying regulations deliberately and with the input of all affected parties. On January 22, 1991, it published a notice of proposed rulemaking, requesting comments on its proposed guidelines. 56 Fed. Reg. 2,296 (Jan. 22, 1991). Over the next six months, the Access

2. The Access Board is a federal agency created under the Rehabilitation Act of 1973. It is comprised of 25 members, including representatives from the DOJ and other federal agencies. 29 U.S.C. § 792(a)(1) (2000).

Board held fourteen public hearings, took testimony from 450 witnesses, received 1,865 written comments, and considered over 12,000 pages of material. *See* ADAAG Final Guidelines, 56 Fed. Reg. 35,408, 35,409 (July 26, 1991). The resulting regulations, called the ADA Accessibility Guidelines for Buildings and Facilities, are minutely detailed and precise. *See, e.g.*, 56 Fed. Reg. 35,408; 28 C.F.R. pt. 36, app. A (2003).[3] The DOJ adopted the ADAAG verbatim in 1991 without further notice and comment. *See* 56 Fed. Reg. 35,544, 35,586 (July 26, 1991).

B. Section 4.33.3 Of ADAAG.

Section 4.33.3 of ADAAG sets forth accessibility guidelines for "assembly" seating. Like all other ADAAG provisions, Section 4.33.3 was adopted by the DOJ in 1991 exactly as drafted by the Access Board, and no changes have been made to the regulation since it was adopted. Section 4.33.3 provides, in relevant part, as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as means of egress in case of emergency. . . . When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. . . .
>
> EXCEPTION: Accessible viewing positions may be

3. There are literally hundreds of detailed ADAAG requirements, covering such things as the placement, width, height, and depth of doorways, aisle and ramp access, toilets, telephones, water fountains, emergency equipment, counter height, audio enhancements, parking, outside access, and other things. *See, e.g.*, ADAAG §§ 4.4.1 (objects protruding from walls must be no more than four inches long); 4.5.3 (carpet pile thickness must be less than one-half of an inch); 4.19.2 (counter surfaces of lavatories must be no more than 34 inches from floor); 4.32.4 (tables and counters must be between 28 and 34 inches from floor).

> clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than five percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. pt. 36, app. A at § 4.33.3, App. 45a.

C. Stadium-Style Movie Theaters, Nationwide Construction, And Belated DOJ Interpretations.

In 1995, four years after the ADAAG was promulgated, one of Regal's competitors opened the first stadium-style movie theater in the United States. This architectural design combines rows of tiered seating that rise at a slope of well over five percent with rows of traditional sloped-floor seating. This elevated seating configuration eliminates "obstructed view" problems that occur, for example, when a tall individual sits in front of a shorter person. Because of the steep grade inherent to this multi-step design, individuals using wheelchairs generally cannot navigate the tiered seating rows. Accordingly, in stadium-style movie theaters with 300 seats or less, such as the theaters at issue in this lawsuit, wheelchair seating is located within the first five rows of each auditorium, directly in front of the tiered seats, and near entranceways and exits.[4] All wheelchair seating locations provide wheelchair-using patrons with clear and unobstructed views of the movie screen, and either adjoin or are amidst seating for the general public.

The public embraced this new movie theater design and virtually every major movie theater operator responded to the demand by building stadium-style multiplexes in locations across the United States. Between 1995 and July of 1998, hundreds of similarly designed stadium-style movie theaters were built, inspected, and opened for business.[5]

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4. In stadium-style movie theaters with 300 or more seats, wheelchair seating is "dispersed" in accordance with Section 4.33.3 to at least two areas of the movie theater. *See* ADAAG § 4.33.3, App. 45a.

5. During the inspection process, the wheelchair seating locations at stadium-style movie theaters owned by Regal and others were approved as "accessible" by state, local, and city officials under (Cont'd)

In July of 1998, more than seven years after Section 4.33.3 was promulgated, and more than three years into the most prolific period of construction in the history of the movie theater industry, the DOJ filed an *amicus curiae* brief in a private plaintiff lawsuit in El Paso, Texas proclaiming, for the first time, that it "interpreted" Section 4.33.3's "lines of sight comparable" language to impose a "viewing angle" requirement, and that this "interpretation" was deserving of deference. This event marked the first of many variations of the "viewing angle" requirement "interpreted" from Section 4.33.3 by the DOJ. Soon thereafter, the DOJ filed lawsuits against several national movie theater companies, including AMC, Cinemark, Hoyts Cinemas, National Amusements, and Sanborn Theaters, based on variations of its "viewing angle" interpretation of Section 4.33.3.[6] At the same time, the DOJ began making *amicus curiae* appearances to advance still more variations of its "viewing angle" interpretation in private plaintiff lawsuits against national movie theater companies Regal, Cinemark, and Hoyts Cinemas.[7]

(Cont'd)
accessibility codes that are identical in pertinent part to Section 4.33.3. For example, the wheelchair seating locations at the Regal stadium-style movie theaters challenged in this case were determined to be compliant with a "lines of sight comparable" provision in Oregon Uniform Building Code § 1109.20.1.1. Similar designs were also approved under state accessibility codes expressly certified by the DOJ as "meeting or exceeding" federal standards. For example, Cinemark USA, Inc. obtained numerous pre- and post-construction approvals signifying that similar wheelchair seating locations in its stadium-style movie theaters complied with the "lines of sight comparable" requirement of Texas Accessibility Standard 4.33.3, which was certified by the DOJ in 1996. *See United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 11, App. 61a (N.D. Ohio Nov. 19, 2001).

6. The DOJ urged variations of its "viewing angle" interpretation in settlement discussions as well. *See* ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,278, App. 47a.

7. The DOJ's interpretation of Section 4.33.3 has been in a state of continuous evolution in the five years since it was first articulated in 1998. The DOJ told the Western District of Texas that wheelchair
(Cont'd)

D. Acknowledgements By The Access Board In 1999 And 2002 That Section 4.33.3 Would Require Additional Language To Create A "Viewing Angle" Requirement.

On November 16, 1999, the Access Board published a Notice of Proposed Rulemaking concerning several proposed ADAAG revisions. *See* 64 Fed. Reg. 62,248, App. 46a-47a. As part of that process, the Access Board discussed possible revisions to Section 4.33.3, and remarked that it was aware that the DOJ had asserted in litigation that Section 4.33.3 imposed certain "viewing angle" requirements. The Access Board stated that it was "*considering* whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of [Section] 4.33.3 to stadium-style movie theaters." *Id.*, App. 48a (emphasis added).

E. The District And Appellate Court Rulings Below.

On April 11, 2000, Kathy Stewmon, Tina Smith, and Kathy Braddy (collectively designated as "Stewmon") filed suit in the

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(Cont'd)

positions must offer sight line angles measured from the wheelchair seating locations to the top of the movie screen that do not exceed 35 degrees. Brief of *Amicus Curiae* United States on Summary Judgment Issues at 4, 8-9, *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (W.D. Tex. Aug. 21, 1998), App. 73a-74a. The DOJ announced to the Access Board that viewing angles for wheelchair seating must be "equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold." *See* ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,278, App. 47a-48a. The DOJ argued to the Central District of California that wheelchair seating locations must provide "a line of sight that approaches an optimal viewing zone." *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1106 (C.D. Cal. 2002). The DOJ made what the District of Massachusetts described as a "confusing, overlong, and . . . 'absurdly demanding'" interpretation of Section 4.33.3 based on a report by a purported expert. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 87 and n.2 (D. Mass. 2003). Finally, in *Stewmon*, the DOJ proffered yet another interpretation, which the court described as requiring movie exhibitors to "provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons." *Stewmon*, 339 F.3d at 1133, App. 17a.

United States District Court for the District of Oregon. Stewmon complained that the wheelchair seating locations in Regal's Portland-area stadium-style movie theaters failed to provide comfortable "viewing angles" allegedly required under Section 4.33.3 and violated the ADA as a matter of law. Regal denied that Section 4.33.3 imposed a subjective "viewing angle" requirement and asserted that wheelchair seating providing unobstructed views to the screen and located amidst or adjacent to seating for the general public complies with Section 4.33.3 and the ADA as a matter of law. Both Stewmon and Regal filed motions for summary judgment.

Shortly before the present lawsuit was filed, the Fifth Circuit issued its decision in *Lara v. Cinemark*, holding that wheelchair seating locations in stadium-style movie theaters that provide unobstructed views of the movie screen comply with the "lines of sight comparable" language of Section 4.33.3. *Lara*, 207 F.3d at 783.[8] The Fifth Circuit reasoned that the text of Section 4.33.3 does not clearly contain a "viewing angle" requirement, that concerns regarding "viewing angle" did not even arise until well after Section 4.33.3 was promulgated, that the common meaning of "lines of sight comparable" refers to unobstructed views and not "viewing angles," and that the Access Board had expressly recognized that additional language was necessary to codify any alleged "viewing angle" requirement. *Id.* at 788-89. In reaching this conclusion and rendering judgment for Cinemark as a matter of law, the Fifth Circuit considered

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8. The Fifth Circuit found it significant that all wheelchair seating at Cinemark's stadium-style movie theaters was located "amidst general public seating." *See Lara*, 207 F.3d at 789; *accord United States v. Cinemark USA, Inc.*, Mem Op. & Order at 18, App. p. 70a-71a (granting summary judgment as to all stadium-style movie theaters where the wheelchair seating provides an unobstructed view of the movie screen and is located amidst or adjacent to seating for the general public). This is logical, since wheelchair seating located "amidst or adjacent to general public seating" is at least presumptively (if not necessarily) "comparable" to general public seating, especially in the context of a small movie theater where all seats are of relatively equal desirability.

and expressly rejected the DOJ's "litigating position" concerning Section 4.33.3. *Id.*

On April 30, 2001, the district court in this action (Hon. Garr M. King) issued a published opinion granting Regal's motion for summary judgment and denying Stewmon's motion for summary judgment. *OPVA*, 142 F. Supp. 2d at 1294, App. 27a. In so holding, the court characterized the reasoning of the Fifth Circuit in *Lara* as "persuasive, given its reliance on the history of [Section] 4.33.3 and the context in which it was promulgated." *Id.* at 1297, App. 35a. As the Fifth Circuit did in *Lara*, the district court concluded that when wheelchair seating provides unobstructed views of the movie screen from locations amidst seating for the general public, it complies with Section 4.33.3. *Id.*, App. 36a. The court also rejected arguments that a "viewing angle" requirement could be interpreted from Section 4.33.3. *Id.* at 1297-98, App. 36a ("it would be unreasonable and inconsistent with the history of Section 4.33.3 . . . to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles"). Stewmon appealed the final judgment to the Ninth Circuit.

On August 13, 2003, a divided panel of the Ninth Circuit, in an opinion authored by the Honorable Betty B. Fletcher, reversed the district court's judgment. Describing Section 4.33.3 as "a broadly-drafted regulation" not limited to what was anticipated at the time the regulation was promulgated, the majority held that the DOJ's "interpretation" that Section 4.33.3 contained a "viewing angle" requirement was valid and deserved deference. *Stewmon*, 339 F.3d at 1133, App. 16a-17a. The court dismissed the Fifth Circuit's contrary conclusion as "particularly specious." *Id.* at 1133 n.9, App. 15a. Ignoring that Regal's theaters were built prior to the publication of the DOJ's "interpretation," the majority did not address the issue of preconstruction notice, but concluded that Regal should have constructed its stadium-style movie theaters to provide wheelchair seating locations "within the range of angles offered to the general public." *Id.* at 1133, App. 17a. Apparently convinced that wheelchair seating located amidst or adjoining

general public seating did not comply with this "viewing angle" requirement, the majority reversed the district court's summary judgment in favor of Regal and remanded the case with instructions to enter summary judgment in favor of Stewmon.[9]

The Honorable Andrew Kleinfeld dissented. He criticized the majority for "set[ting] up a conflict with the Fifth Circuit," adopting an "unjust" interpretation of Section 4.33.3, and "irresponsibl[y] impos[ing] on the country a decision that will require of an industry so much reconstruction" without notice. *Stewmon*, 339 F.3d at 1134, App. 18a-20a (Kleinfeld, J., dissenting). Judge Kleinfeld also disapproved of the DOJ's attempt to "interpret" into existence new substantive requirements, stating "the regulation plainly does not mean what the Justice Department says it means," and pointing out that the Access Board's 1999 Notice of Proposed Rulemaking "implicitly acknowledges" that the DOJ is "arguing for creation of new law rather than a permissible construction of existing regulations." *Id.* at 1134-36, App. 20a, 24a (Kleinfeld, J., dissenting). According to Judge Kleinfeld, by unjustly "[r]egulating movie theater architecture retroactively by vague judicial fiat," the majority decision "puts theater owners in a position of impossible uncertainty as to what they must do to comply with the law." *Id.*, App. 18a, 20a (Kleinfeld, J., dissenting).

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9. In reversing the district court's decision to grant Regal's motion for summary judgment against Stewmon, the Ninth Circuit majority assumed contested facts in the light most favorable to Stewmon. *See Stewmon*, 339 F.3d at 1129-1130. The court not only drew permissible inferences in favor of Stewmon, however, but it also relied on documents, including purported industry studies, for which there was no proper foundation in the record. Even more troubling, the court relied on the same faulty "evidence" and applied the same "in the light most favorable to Stewmon" presumptions to support its decision to direct the district court to *grant* Stewmon's motion for summary judgment. In considering *Stewmon's* motion for summary judgment, the Ninth Circuit was obligated to consider record facts in the light most favorable to *Regal* (the non-moving party in that motion). *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's *Stewmon* decision condemns builders, owners, and operators of public accommodations to "impossible uncertainty" as to what is legally required when designing and constructing places of public accommodation. The same stadium-style movie theater design that was approved as compliant with federal accessibility regulations by the Fifth Circuit (and federal courts in Texas, Ohio, and Oregon) has been declared noncompliant in the Ninth Circuit. The decision below effectively creates new "viewing angle" standards for wheelchair seating in assembly areas, puts "thousands of movie theaters . . . out of compliance with the law," and subjects "facilities built in compliance with the law according to the best knowledge of design professionals at the time" to devastating retrofitting liabilities. *Stewmon*, 339 F.3d at 1134, App. 19a (Kleinfeld, J., dissenting). At the same time, architects and builders have no clear explanation of how they allegedly failed to build lawfully in the first place, and still lack notice of a clear and precise requirement to comply with for future construction purposes. *See id.* at 1134, App. 24a (Kleinfeld, J., dissenting) ("the majority's gloss on the regulation, besides being something different from what the regulation says, is no help at all to theater owners trying to comply with the law").

The dispute over whether Section 4.33.3 may be interpreted to impose a new "viewing angle" requirement is recurring, as illustrated by the Fifth Circuit's *Lara* decision, the Ninth Circuit's *Stewmon* decision, and the fact that cases presenting this same issue are now pending in the Sixth Circuit (*United States v. Cinemark*), the First Circuit (*United States v. Hoyts*), and several other district courts.[10] Resolution of this issue is

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10. Eight other federal district courts have issued rulings in similar stadium-style movie theater cases. Federal district courts in the Southern, Eastern, and Western Districts of Texas followed *Lara* and dismissed with prejudice lawsuits presenting facts, claims, and legal issues virtually identical to those in the present case. *See Wittie v. Cinemark USA, Inc.*, No. A-98-CA-40JN (W.D. Tex. 1998) (dismissing Section 4.33.3 (Cont'd)

urgently needed so that builders of movie theaters and other places of public accommodation will know what is expected of them. Not only does the current conflict inhibit public accommodation construction, the ambiguity of the Ninth

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(Cont'd)
challenges to stadium-style movie theater wheelchair seating locations in Austin, Texas and Pflugerville, Texas); *Vander Hee v. Cinemark USA, Inc.*, Civ. Action No. M-98-230 (S.D. Tex. 1998) (same in Mission, Texas); *Drey v. Cinemark USA, Inc.*, Civ. Action No. H-98-2021 (S.D. Tex. 1998) (same in Houston, Texas); *Freeland v. Cinemark USA, Inc.*, Civ. Action No. 1:98CV1976 (E.D. Tex. 1998) (same in Beaumont, Texas). In *United States v. Cinemark*, which is now pending before the Sixth Circuit, the Northern District of Ohio held that Section 4.33.3 imposed no "viewing angle" requirement and that wheelchair seating providing unobstructed views of the movie screen from locations amidst or adjoining general public seating was lawful. *See United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 11-12, App. 62a-65a. In *Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002), the Northern District of New York found that Section 4.33.3 imposes a "viewing angle" requirement but adopted a modified version of the *Lara* court's holding that wheelchair seating areas providing unobstructed views to the screen and located-amidst seating for the general public comply with Section 4.33.3. That decision was subsequently vacated by the Second Circuit and remanded with directions that the lower court consider whether the court should give deference to the DOJ's "interpretation" and whether Hoyts was given preconstruction notice of that "interpretation." *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 WL 21510423 (2d Cir. July 1, 2003). In *United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1111, 1113 (C.D. Cal. 2002), the Central District of California concluded that "flexible" language in Section 4.33.3 imposes a "comparable viewing angle" requirement and ruled that wheelchair seating locations in AMC's stadium-style movie theaters were unlawful. Finally, in *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 89 (D. Mass. 2003), which is now pending before the First Circuit, the District of Massachusetts concluded that Section 4.33.3 could be interpreted to impose a "viewing angle" requirement, but because the DOJ failed to give Hoyts preconstruction notice of any "viewing angle" interpretation, any "viewing angle" requirement would be limited to prospective application only.

Circuit's decision further exacerbates the confusion for those who build and invest in places of public accommodation. As stated by Judge Kleinfeld, "[i]f a judge on the panel cannot say just what is required [by this decision], how can a movie theatre owner? It is irresponsible to impose on the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done." *Stewmon*, 339 F.3d at 1134, App. 20a (Kleinfeld, J., dissenting).

The Ninth Circuit's *Stewmon* decision invites agencies to misuse the judiciary as a proxy for conducting substantive rulemaking while circumventing the notice and comment procedures required by the Administrative Procedure Act, 5 U.S.C. §§ 551-912. Courts following the Ninth Circuit's reasoning feel constrained by this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), to grant "controlling" outcome-determinative deference to an agency's purported interpretation of an ambiguous regulation. However, when the agency's "interpretation" includes substantive obligations not clear from the face of the regulation, the application of "controlling deference" implicates critical administrative law principles. When the courts give binding effect to the substantive requirements of an agency's interpretation of an ambiguous regulation, an interpretative policy statement becomes a *de facto* legislative rule for all practical purposes. Even worse, while effectively binding the public to its new interpretation, the DOJ retains the flexibility to "reinterpret" the law another day. Unless this deference standard conflict is resolved, the reliability and finality of all accessibility construction regulations will remain in question. Moreover, nothing limits the Ninth Circuit's holding to the movie theater industry or the ADA specifically; other regulated industries face comparable uncertainty. Allowing the agencies to offensively use the deference doctrines, as shown by the DOJ's opportunistic litigation practices here, increases an agency's power well beyond that contemplated by Congress in the APA.

A. The Ninth Circuit's Interpretation Of Section 4.33.3 Creates A Conflict With The Fifth Circuit That Must Be Resolved By This Court.

By holding that Section 4.33.3 may be interpreted to impose a previously unarticulated "viewing angle" requirement for wheelchair seating locations in places of public assembly, the Ninth Circuit created a direct conflict with the Fifth Circuit and with lower courts on several issues. In *Lara*, the Fifth Circuit found that wheelchair seating locations similar to those at issue here, located near the front of the movie theater amidst seating for the general public, complied with Section 4.33.3 as a matter of law. *Lara*, 207 F.3d at 788-89. The Northern District of Ohio and the district court below each reached the same conclusion with respect to substantially similar stadium-style movie theater configurations. *See United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 11-12, App. 62a-65a; *OPVA*, 142 F. Supp. 2d at 1297, App. 35a.; *accord Stewmon*, 339 F.3d at 1136, App. 25a-26a (Kleinfeld, J., dissenting).

The Fifth Circuit, the Northern District of Ohio, and the District of Oregon each determined that the common and historical meaning of "lines of sight comparable" refers to unobstructed views, not "viewing angles." *See Lara*, 207 F.3d at 788 (DOJ and Access Board explicitly considered questions of obstruction before issuing Section 4.33.3, but not questions of viewing angles); *United States v. Cinemark*, Mem. Op. & Order at 11, App. 62a-63a ("The government has not persuaded the [c]ourt that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle."); *OPVA*, 142 F. Supp. 2d at 1297, App. 35a (finding the Fifth Circuit's reasoning on the history of Section 4.33.3 to be "persuasive"); *see generally Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997) ("We think the language 'lines of sight comparable' quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without

any obstruction."). The Ninth Circuit majority disagreed. *See Stewmon*, 339 F.3d at 1133, App. 16a-17a.[11]

The Fifth Circuit, the Northern District of Ohio, and the District of Oregon each found that the DOJ's "interpretation" was not supported by indications of agency intent at the time the regulation was promulgated. *See Lara*, 207 F.3d at 788 ("questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3"); *OPVA*, 142 F. Supp. 2d at 1297-98, App. 36a ("it would be unreasonable and inconsistent with the history of Section 4.33.3 . . . to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles"); *United States v. Cinemark*, Mem. Op. & Order at 11-13, App. 61a, 65a ("[t]he government has not persuaded the Court that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle" and "the DOJ's position with respect to Cinemark's stadium-style theaters is not embodied in the current [regulation]"). The Ninth Circuit discounted agency intent at time of promulgation, finding instead that applying Section 4.33.3 to situations not contemplated by the DOJ when it enacted the regulation demonstrates (admirable) "breadth," not "ambiguity." *Stewmon*, 339 F.3d at 1133, App. 16a.

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11. The Fifth Circuit, the Northern District of Ohio, and the District of Oregon also found it significant that wheelchair seating locations amidst or adjacent to seating for ambulatory patrons inherently were "comparable" to seating for the general public. This analysis is particularly compelling with respect to the smaller venues at issue in this case, since Section 4.33.3 permits wheelchair seating to be clustered in a single location where, as here, there are fewer than 300 seats, and also where, as here the tiered seating rises at slopes of greater than five percent. *See* ADAAG § 4.33.3, App. 45a. The District Court for the Northern District of New York also discussed the comparability of wheelchair seating locations amidst general public seating in *Meineker v. Hoyts Cinemas Corp.* While the court believed that Section 4.33.3 imposed a "viewing angle" requirement, it ultimately concluded that wheelchair seating areas providing unobstructed views to the screen and located amidst seating for the general public complied with Section 4.33.3 as a matter of law. *Meineker*, 216 F. Supp. 2d at 18.

Finally, the Fifth Circuit, the Northern District of Ohio, and the District of Oregon independently determined that the Access Board's November 1999 comments, delivered as part of that agency's on-going ADAAG rulemaking, evidenced that no "viewing angle" requirement existed. *See Lara*, 207 F.3d at 788-89 (rejecting DOJ's "viewing angles" interpretation in light of Access Board's consideration of proposal to modify Section 4.33.3); *OPVA*, 142 F. Supp. 2d at 1297, App. 36a (finding it would be unreasonable and inconsistent with . . . the statements of the Access Board to defer to the DOJ's "viewing angles" interpretation); *United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 13, App. 64a (reasoning that the Access Board's comments "evidence that the DOJ's position [on viewing angles] with respect to Cinemark's stadium-style theaters is not embodied in current Section 4.33.3"); *see also Stewmon*, 339 F.3d at 1134, App. 20a (Kleinfeld, J., dissenting) (concluding that the Access Board's 1999 Notice of Proposed Rulemaking "implicitly acknowledges" that the DOJ is "arguing for creation of new law rather than a permissible construction of existing regulations").[12] The Ninth Circuit ignored the Access Board's 1999 acknowledgements altogether.

By expansively interpreting Section 4.33.3 to mandate compliance with previously unarticulated "viewing angle" construction requirements, summarily rejecting the Fifth

12. These courts also rejected any argument that Section 4.33.3 should be applied flexibly based on the subjective "preference" of movie patrons. *See Lara*, 207 F.3d at 789 ("To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers."); *accord Stewmon* 339 F.3d at 1136, App. 23a (Kleinfeld, J., dissenting) (discussing differing preferences for seating in the front (for maximum picture size and stereo effect and to avoid distractions), the back (for greater height and sense of separation from the picture), the aisles for easy access to bathrooms and concession stands), and the center (to avoid aisle distractions), and concluding that "lines of sight for the wheelchair seats cannot be comparable to all of these, without requiring the scattering of wheelchair seating that the 300-seat provision expressly avoids requiring in small theaters").

Circuit's contrary reasoning as "specious," and ignoring the meaning and effect of the Access Board's rulemaking efforts, the Ninth Circuit has injected unnecessary confusion, error, and uncertainty into public accommodation accessibility law. Architects, builders, and owners of public accommodations who must rely on clear, precise, and prospective regulations to build public facilities now have a circuit split and federal district court conflicts, resulting in varying interpretations of a supposedly uniform regulation and "impossible uncertainty." Legality under a federal regulation should not vary from circuit to circuit, and certainly should not present conflicts for Regal and other national movie theater companies who own and operate stadium-style movie theaters in both the Fifth and Ninth Circuits. A definitive ruling by this Court is necessary to resolve these issues and ensure a uniform interpretation of Section 4.33.3 for architects and builders across the nation.

B. The Court Should Determine Whether The Judiciary Should Accord "Controlling Deference," Or Any Deference, To An Agency's After-The-Fact Interpretation Of A Regulation That Imposes Substantive Obligations Not Clear From The Face Of The Regulation And Is Adopted Without APA Notice And Comment.

1. Administrative agencies should be prevented from invoking judicial deference to impose new substantive regulatory requirements on the public.

The Ninth Circuit's enforcement of the DOJ's "interpretation" of Section 4.33.3 ratifies an affirmative and offensive use of this Court's pronouncements regarding the appropriate circumstances for granting deference to agency interpretations espoused in litigation and dishonors Congress's limits on agency rulemaking. Through concerted litigation efforts, the DOJ has effectively created new substantive obligations under Section 4.33.3 that were not contemplated when the rule was promulgated. In giving a "controlling" level of deference to such agency action, the Ninth Circuit's opinion raises a profound and broadly significant issue of administrative

law. Specifically, the Ninth Circuit's decision opens the door to widespread circumvention of APA rulemaking requirements by allowing agencies to use a judiciary constrained by deference doctrines as a proxy to conduct substantive rulemaking without engaging in notice and comment. As discussed below, the Ninth Circuit's approach stems in part from a significant tension in this Court's judicial deference doctrine on the one hand, and the APA on the other. Under these deference doctrines, the courts effectively imbue mere interpretations of rules with the force of law, which results in *de facto* agency rulemaking.

In *Auer*, this Court deferred to an agency's interpretation of an ambiguous regulation.[13] The Court stated that the agency's interpretation was "controlling" unless it was plainly erroneous or inconsistent with the regulation. *Auer*, 519 U.S. at 461. Although the interpretation was challenged because it was articulated in a legal brief, the Court found that the Secretary's position "was in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack" and that there was "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)) (quotations omitted). By contrast, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court refused to defer to an agency's interpretation of a regulation, as set forth in an opinion letter and later buttressed by an *amicus curiae* brief. *Id.* at 587, 591. The Court held that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* at 587. The Court recognized that according controlling deference

13. While Regal believes that Section 4.33.3 is not ambiguous, the Ninth Circuit apparently disagreed, as it invoked *Auer* to defer to the DOJ's interpretation, and such deference "is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

creates a risk of "permit[ting] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 588.[14]

2. The Court should resolve the recurring confusion in the lower courts concerning where to draw the line between administrative flexibility for non-binding policy statements and procedural safeguards for substantive rulemaking under the APA.

Under the APA, federal agencies must follow specific rulemaking procedures before formulating substantive rules. 5 U.S.C. §§ 553(b), (c).[15] Those procedures ordinarily require published notice and an opportunity for public comment, followed by agency deliberation, explanation, and publication of the final rule in the Federal Register. The APA distinguishes "legislative" rules from "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" that do not bind the public. 5 U.S.C. § 553(b)(3); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law and are not accorded that weight in the adjudicatory process. . . ."). A rule is substantive if it "grants rights, imposes obligations, or produces significant effects on private interests" or "creates new law, rights, or duties." *Ohio Dep't of Human Servs. v. United States Dep't of Health & Human Servs.*, 862 F.2d 1228, 1232

14. Similarly, in *Bowen*, the Court held "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice" are unworthy of deference. *Bowen*, 488 U.S. at 212. In addition, the Court noted that "*post hoc* rationalizations for agency orders" were not entitled to deference, and further observed that the agency's interpretation conflicted with positions taken in other cases. *Id.* at 212-13.

15. The APA defines rules as statements "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of . . . facilities." 5 U.S.C. § 551(4)

(6th Cir. 1988); *accord Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979). The courts determine whether a rule must be promulgated after notice and comment by examining its substance rather than relying upon the label given by the agency. *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) ("the label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact").[16] The characterizations of agency statements as "interpretive rules, general statements of policy, or rules of agency procedure" under 5 U.S.C. § 553(b) are "narrowly construed" and "only reluctantly countenanced." *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989); *accord*, *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989). If a rule is determined to be substantive in character but was not subjected to notice and comment, the Court "shall hold unlawful and set aside" the rule as statutorily unauthorized agency action. 5 U.S.C. § 706(2)(C), (D).[17]

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16. Courts have held that legislative rules were manifest in a procedure paper (*Phillips*, 22 F.3d at 621); a purported guidance document (*Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002)), an agency notice to the affected industry (*Brown Express*, 607 F.2d at 703), and an agency directive (*Lewis-Mota v. Sec'y of Labor*, 469 F.2d 478, 482 (2d Cir. 1972)).

17. The rulemaking procedures set forth in the APA not only operate as a check on administrative abuse, but also are essential to uphold the principles of democratic governance in a regulatory age. "[H]igh-handed agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action." *Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). "[A]dvance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era." *Id.* at 472 (Bazelon, J., concurring). An agency's attempt to make an interpretative rule do the work of a legislative rule offends the APA and principles of sound government. *See generally* Robert A. Anthony, (Cont'd)

When applying *Auer* to defer to agency interpretations articulated in litigation, the courts have struggled to effectuate the requirements of the APA. In *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), for example, the Seventh Circuit considered the DOJ's interpretation of the ADA as set forth in an *amicus* brief, and commented that the proper degree of deference to give an agency's informal policy announcements under current law is "unsettled." *Id.* at 563. The court further observed,

> though we know from *Auer* . . . that in some circumstances at least, an agency's *amicus* brief is entitled to some deference, it cannot be very great when it is the brief of an agency that has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance.

Id. (citing *D.C. Arena*, 117 F.3d at 588-89). Other courts have recognized that litigating positions may not truly reflect the "fair and considered judgment" required by *Auer* to merit deference. *See, e.g., Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997).[18]

(Cont'd)

Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public, 41 Duke L.J. 1311, 1372-73 (1992).

18. Moreover, the absence of a longstanding agency practice prior to litigation weighs against granting deference. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962) ("We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. . . . [U]nless we make the requirements of administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion."); *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 198-99 (3d Cir. 1997) (consistency between agency's prior policy statement and litigating position supports deference); *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999) (legal brief not entitled to deference).

When a new substantive requirement masquerades as an agency interpretation, some courts have looked beyond form and declined to defer. In *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), the Seventh Circuit refused to allow the agency, through internal memorandum and interpretation, to quantify a specific height requirement for fences used to contain the animals. *Id.* at 170-71. The court recognized that the specific height requirement would put some unknown portion of the industry out of compliance and put their fences in jeopardy. If the agency intended to bind the industry, the court reasoned, the APA's requirements for legislative rules would apply. *Id.* at 169-170.[19]

3. This case presents an ideal opportunity for the Court to resolve recurring issues concerning judicial deference to agency interpretations.

The conflict between the Ninth and Fifth Circuits over the interpretation of Section 4.33.3 presents a paradigmatic example of conflicts concerning whether deference is owed to an agency's "interpretation" setting forth specific substantive obligations in the context of litigation. On the one hand, the Fifth Circuit rejected the DOJ's interpretation, treating it as a "litigating position." On the other hand, the Ninth Circuit concluded that the DOJ's interpretation commanded "controlling deference" under virtually identical circumstances. *Compare Lara*, 207 F.3d

19. Similarly, in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the court recognized that if an agency treats a document as it would a legislative rule, the document may be considered "binding" and subject to the strictures of the APA. *Id.* at 1020-22, 1028 (holding that settled position set forth in "guidance" document was effectively binding, and accordingly setting aside guidance document for failure to comply with rulemaking procedures); *see also Gen. Elec.*, 290 F.3d at 383-84 (vacating "guidance" document establishing specific risk assessment techniques and guidance for review as improper legislative rule); *Am. Frozen Food Inst., Inc. v. United States*, 855 F. Supp. 388, 390-91, 396 (CIT 1994) (agency definition quantifying type face and font size for label was not a valid interpretation but rather improperly imposed additional requirements).

at 788-89, *with Stewmon*, 339 F.3d at 1132, App. 15a-16a.[20] The DOJ interpretations offered in these cases went beyond merely clarifying purportedly ambiguous terms and actually imposed specific substantive requirements that were not clear from the plain language of the rule. By enforcing these substantive requirements, which were found only in agency documents that post-date the regulation, the Ninth Circuit has effectively imparted the force of law upon an "interpretive" rule, in conflict with the APA and sound administrative law jurisprudence.[21]

4. This Court should hold that the DOJ's interpretation of Section 4.33.3 is not entitled to deference.

The Ninth Circuit *Stewman* majority has given agencies great incentives to forgo the legislative rulemaking process in favor of simply "interpreting" new obligations into purportedly ambiguous rules. Rulemaking by *amicus* is bad public policy.

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20. Still other courts have addressed the appropriate level of deference to give the DOJ's interpretation of Section 4.33.3 with disturbingly varied results. For example, the district court in *Meineker* implicitly rejected the DOJ's interpretation of Section 4.33.3. *Meineker*, 216 F. Supp. 2d at 18. On appeal, the Second Circuit, in an unpublished decision, vacated the district court's judgment and remanded the case for consideration of two issues, (1) whether the DOJ's interpretation of Section 4.33.3 was entitled to deference as a "fair and considered judgment" under *Auer* or whether it was merely a *post hoc* rationalization or convenient litigation position entitled to little deference under *Christensen* and *Bowen*, and (2) whether the theater owner had reasonable notice of the DOJ's interpretation when the theaters were constructed or renovated. *Meineker*, 2003 WL 21510423, at *3-4.

21. Other efforts by the DOJ to expand the substantive requirements of Section 4.33.3 through litigation in the context of viewer obstructions in sports stadiums have also resulted in conflicting circuit opinions. *Compare Caruso*, 193 F.3d at 737 (rejecting interpretation of Section 4.33.3 that would require sight lines over standing spectators), *with D.C. Arena*, 117 F.3d at 584-85 (deferring to DOJ's interpretation in sports stadium context); *see also Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (rejecting DOJ's interpretation).

See D.C. Arena, 117 F.3d at 584 ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' That technique would circumvent § 553, the notice and comment procedures of the APA."). If left unchecked, the Ninth Circuit's holding allows courts to misapply *Auer* and agencies to eviscerate the APA's notice and comment process, effectively erasing the distinctions between interpretive and legislative rules.

The DOJ's tactics here stand in stark contrast to the agency conduct meriting deference in *Auer*. In *Auer*, the Court asked for an agency's interpretation of a regulation and the agency (there, the Department of Labor) provided it. *See Auer*, 519 U.S. at 461. Here, no court asked for the DOJ's opinion. Rather, the DOJ deliberately set out to construct and impose a new "viewing angle requirement" by litigation. The DOJ has not only filed strategic lawsuits, it has injected itself into private cases on an opportunistic basis in order to submit *amicus curiae* briefs and demand "controlling" deference for its interpretation. More often than not, the DOJ appears in these private-party cases in an effort to tip the scales against the theater owners at some critical juncture (such as after the close of discovery and sometimes even after the private plaintiff loses).[22]

The Court should grant certiorari to explain the limits of *Auer* deference to administrative agencies and the courts. It does

22. This attempt to regulate by litigation has drawn criticism from several federal courts. *See Lara*, 207 F.3d at 788-89 (court refused to defer to DOJ's "litigating position" where DOJ failed to provide clear guidance despite Congressional mandate to do so); *Hoyts*, 256 F. Supp. 2d at 92 n.16 ("But for the Government's obduracy, it appears possible to have resolved this dispute via rulemaking settlement."); *OPVA*, 142 F. Supp. 2d at 1297 n.2, App. 35a ("vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"); *accord Indep. Living Res*, 982 F. Supp. at 743 ("[the DOJ's] interpretation of Standard 4.33.3 expressed in the 1994 TAM supplement is an attempt to impose a new substantive obligation, which may not be accomplished under the rubric of an 'interpretive regulation'").

not appear that this Court intended for *Auer* to support the offensive use of interpretative statements and deference by agencies through industry-wide litigation, as the DOJ did here. *Amicus curiae* briefs and federal complaints are poor substitutes for the notice and comment process mandated by the APA. Such litigation documents do not provide a clear or reliable means for notifying the public of an agency's intent or policy. Moreover, the public is deprived of input on the potential regulations.

As various courts may evaluate the factors considered in the deference doctrines differently, there is a substantial likelihood of inconsistent results and continued "impossible uncertainty." Two primary purposes of federal regulation – uniformity and predictability – have been undermined by an agency's rulemaking-by-litigation strategy, and, knowingly or not, the Ninth Circuit has become the agency's accomplice.

C. Permitting Agencies To Add Substance To Regulations Retroactively Through Litigation Violates The Fair Notice Doctrine And The Due Process Clause.

The Court should not endorse or encourage agencies to interpret regulations through litigating positions in a manner that violates the fair notice doctrine and constitutional due process. When an agency seeks to impose punitive sanctions for violations of its interpretations of regulations, such interpretations must be "ascertainably certain" from the regulation's plain language to be enforceable under the fair notice doctrine. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995). In this case, the express language of Section 4.33.3 failed to give Regal, along with the entire industry, reasonable notice of any specific viewing angle requirement for wheelchair accessible seating. When the terms of a regulation are so opaque as to be susceptible to substantive development through extrinsic "interpretive" documents provided by an agency, applying those standards to conduct that predates the "interpretive" documents violates the fair notice doctrine.

The federal courts, experts in construing regulations, cannot agree on whether the terms of Section 4.33.3 include the viewing angle requirements announced by the DOJ in its *amicus* briefs,

as discussed above. Section 4.33.3 – read without the benefit of the DOJ's *amicus curiae* briefs – is not "reasonably comprehensible to people of good faith" as including any specific "viewing angle" requirement, and accordingly it does not fairly inform theater owners of the DOJ's perspective.[23] Indeed, courts finding to the contrary rely on the DOJ's interpretation found in extrinsic documents (namely, the *Lara amicus* brief and other litigation documents). *See Stewmon*, 339 F.3d at 1130 & n.5, App. 10a-11a; *Hoyts*, 256 F. Supp. 2d at 87, 89; *AMC*, 232 F. Supp. 2d at 1113.

If the federal courts cannot agree on whether a specific viewing angle is required by a reading of Section 4.33.3 in isolation, the movie theater industry cannot be charged with knowledge of the DOJ's current position back when the theaters were constructed. Thus, regardless of any deference that might be given to the DOJ's interpretation, "the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co., Inc. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) (citations omitted); *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (finding that manufacturer was not "out of compliance with a standard" when agency failed to give fair notice of the standard's requirement); *accord, Alaska Prof'l Hunters Ass'n, Inc. v. FAA*,

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23. At essence, the DOJ employs *Auer* to rubber-stamp the creation of new obligations through an agency's interpretation in an *amicus* brief. Without incurring the inconvenience of notice and comment required by the APA, an agency may bind the courts and the public, while itself retaining flexibility to "reinterpret" the rule another day. This contradicts sound administrative law principles. *See generally* Anthony, *Interpretive Rules*, 41 Duke L. J. at 1372-73. Such a callous application of *Auer* defeats the calibrated mechanism for agency rulemaking provided by Congress in the APA: the regulated party is bound without notice, the public is denied legislative process, yet the agency itself is not restricted by its informed "interpretation" and may freely modify its interpretation in an unpredictable manner in the future.

177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to know the rules by which the game will be played.").

Enforcing the DOJ's "interpretation" of Section 4.33.3 retroactively violates Congress's clear intent in requiring the ADAAG to be published well before it was enforced. Congress expressly directed the DOJ to provide substantial advance notice of architecture and design requirements of Title III. *See* 42 U.S.C. § 12204, App. 43a (requiring Access Board issue architecture and design guidelines within nine months after passage of the ADA); 42 U.S.C. § 12186(b)-(c), App. 41a (requiring the Attorney General to issue regulations consistent with the Access Board's guidelines not later than one year following passage of the ADA); 42 U.S.C. § 12183(a), App. 41a (Title III's accessible design requirement for new construction applies to buildings first occupied after 30 months following passage of the ADA). As acknowledged by some courts, judges are in no position to revisit and reinterpret technical requirements. *See, e.g., Indep. Living Res.*, 982 F. Supp. at 746 ("courts are ill-equipped to evaluate [post-construction] claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable"); *Caruso*, 968 F. Supp. at 216-17 ("considerations of due process and the realities of building large, expensive facilities counsel against the courts making architectural, design or engineering judgments in the guise of statutory interpretation").

Agency *amicus curiae* briefs and complaints are not an effective or just means for providing proper notice of new regulatory requirements. *Stewmon*, 339 F.3d at 1134, App. 20a (Kleinfeld, J., dissenting) (criticizing majority opinion and the DOJ for "irresponsibl[y] impos[ing] on the country a decision that will require of an industry so much reconstruction" without notice); *OPVA*, 142 F. Supp. 2d at 1297 n.2, App. 35a (suggesting that "the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather

than through an interpretative rule"). The decision below undermines an established and predictable notice and comment procedure in favor of unpredictable and punitive litigation.

CONCLUSION

"The wording of laws should mean the same thing to all men." Charles-Louis de Secondat, Baron de Montesquieu, De l'Espirit des Lois (The Spirit of Laws), 1748. Congress recognized that uniformity, notice, and precision in the "wording of laws" is particularly important in the context of the federal construction regulations applied to buildings of public accommodation. Congress intended that Title III of the ADA be enforced via express enabling regulations, adopted deliberately, and with due consideration of all available expertise. Congress also intended that builders have ample notice of such regulations, including an opportunity to comment, object, and illuminate. The entire statutory and regulatory scheme emphasizes notice, process, and clarity. Indeed, when obligations are measured by inch, percentage, and degree, "flexibility" of interpretation is hardly a virtue. In no way did Congress sanction the creation of new obligations casually and through piecemeal litigation, such that the "wording of law" may mean one thing in the Fifth Circuit, something else within the Ninth Circuit, and perhaps still something else tomorrow.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED AUGUST 13, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-35554

D.C. No. CV-00-00485-KI

OREGON PARALYZED VETERANS OF AMERICA, an Oregon non-profit Corporation,

Plaintiff,

and

KATHY STEWMON; TINA SMITH; KATHY BRADDY,

Plaintiffs-Appellants,

v.

REGAL CINEMAS, INC., a Tennessee Corporation doing business in Oregon; EASTGATE THEATRE INC., dba Act III Theater, Inc.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted
December 2, 2002—Seattle, Washington

Appendix A

Filed August 13, 2003

Before: Betty B. Fletcher, Andrew J. Kleinfeld and M. Margaret McKeown, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Kleinfeld

OPINION

B. FLETCHER, Circuit Judge:

This appeal concerns the validity of the Department of Justice's ("DOJ") interpretation of its own regulation requiring that movie theaters, pursuant to Title III of the ADA, provide comparable lines of sight for wheelchair-bound and non-wheelchair-bound moviegoers. Three individual, disabled plaintiffs and the Oregon Paralyzed Veterans of America ("OPVA") sued two companies that own and operate movie theaters in Oregon. The theaters at issue located all wheelchair-accessible seats in the front rows, where the vertical viewing angle was significantly sharper than in the rest of the theater.

The plaintiffs raised three claims. First, they alleged that the "stadium seating" plans in six of the defendants' movie theaters violate Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182, and DOJ's regulations promulgated thereunder. The plaintiffs also claimed that the seating plans violate Oregon's public accommodations statute, Or. Rev. Stat. § 659.425(3), and claimed negligence in the design, construction, and operation of the stadium-riser

theaters. They sought declaratory and injunctive relief, compensatory and punitive damages under the Oregon statute, and damages for negligence (in an amount to be proved at trial), in addition to attorneys' fees and costs.

The district court granted summary judgment to the defendants on all three claims. The three individual plaintiffs[1] now appeal the district court's decision as to the ADA claim only. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I. FACTS

Viewed in the light most favorable to the appellants, the non-moving parties, *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002), the record reveals the following facts. The plaintiffs-appellants in this case are three disabled, wheelchair-bound individuals living in Oregon. The defendants are Regal Cinemas, Inc. and Eastgate Theatre, Inc., two companies that own and/or operate six movie theaters in Oregon.[2] All six theaters utilize a design incorporating "stadium-riser seating," which places most of

1. OPVA, the fourth plaintiff in the original lawsuit, has not joined in this appeal.

2. The six theaters are the Movies on TV theater complex in Washington County, the Division Street Theaters in Multnomah County, the Stark Street theater complex in Portland, the Wilsonville 9 complex in Clackamas County, the Santiam 11 complex in Marion County, and the Sherwood 10 theater in Yamhill County. All six were designed and constructed for first occupancy after January 26, 1993, and are thus subject to the requirements of Title III of the A.D.A. for "new construction." 42 U.S.C. § 12183(a)(1).

the theater seats on stepped risers rather than on a sloped floor. The purpose of the stadium design is to maximize unobstructed views for theater patrons. In most cases, the first few rows at the front of the theater are set on a sloped floor; there is an aisle at the entry level of the theater separating the sloped portion of the seating from the riser section, and the stadium seats (approximately 6-13 rows) then rise behind the aisle, with each row raised 15-18" above the one in front of it.

In order to get to the seats in the stadium riser section, patrons must walk up stairs on either side of the seating section. The riser seats are not wheelchair-accessible. In all six theaters, seating for disabled patrons is located only in the first five rows; in five of the six theaters,[3] wheelchair-accessible seating is located only on the sloped portion of the floor, not in the aisle or in the stadium seating, with over half of the accessible seats in the very front row. The result is that all patrons who require wheelchairs have no choice but to sit in the first few rows of the theater.

As the appellants point out, locating all of the wheelchair-accessible seating in the first few rows of the theaters creates significant disadvantages for wheelchair-bound patrons. Plaintiffs' experts, who visited the theaters and conducted research there, found that the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the

3. The only exception is the Sherwood Theater, in which four of the auditoriums have wheelchair-accessible seating located in the stadium riser areas.

non-wheelchair seating — a difference the experts termed a "tremendous disparity." In reality, however, the disparity is even greater, because wheelchair-bound patrons cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater.

In its engineering guideline for movie theaters, the Society of Motion Picture and Television Engineers ("SMPTE") concluded that, for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees, and when the horizontal line of sight measured between a perpendicular to the viewer's seat and the centerline of the screen exceeds 15 degrees. Soc'y of Motion Picture & Television Eng'rs, *SMPTE Engineering Guideline: Design of Effective Cine Theaters 5* (1994) (hereinafter *SMPTE Guideline*). Thus, not only do the wheelchair seats themselves have, on average, highly unfavorable viewing angles relative to the rest of the theater, but the patrons sitting in them will be less able than other patrons to adjust for those angles by shifting position in their seats.

The experts' conclusions were also borne out by the individual plaintiffs' own experiences in the theaters, as recounted in their affidavits and deposition testimony. Kathy Stewmon, who has multiple sclerosis and has been wheelchair-bound since 1989, related:

> Sitting in [the front row], so close to the screen, the screen was so huge that I couldn't focus on it; it made me dizzy trying to focus. I had to keep moving my head and neck back and forth to look

> at the whole movie screen. I found myself losing the story because I was working so hard to watch the screen; I couldn't concentrate on the movie.
>
> . . .
>
> I only lasted about 15 minutes in the front row — I couldn't tolerate it. My family members dragged my wheelchair up the stairs, which was [a] very dangerous and precarious thing to do, so I could watch the movie.

Plaintiffs Tina Smith and Kathleen Braddy related similar experiences: sitting in the front row of the theater made Smith nauseous and gave her a headache, and Braddy testified that she was unable to watch a movie with her grandson from the wheelchair-accessible rows of the theater because she would have had to bend her neck back to the point where her vision would have been blurry, and because the sound was "not comfortable that close."

In the district court, both the plaintiffs and the defendants moved for summary judgment. The district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment.[4] *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001). The district court recognized that the defendants' movie theaters are public

4. The district court granted the defendants' motion for summary judgment on all three grounds. However, because only the ADA claim is presented in this appeal, this section will address only those parts of the district court's opinion that pertain to it.

accommodations subject to Title III of the ADA, which provides generally:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). As the district court went on to note, Congress directed the Department of Justice ("DOJ") to issue regulations that provide substantive standards applicable to facilities covered under Title III. 42 U.S.C. § 12186(b); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997), *cert. denied sub nom. Pollin v. Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998). DOJ, in turn, adopted as regulations a set of guidelines promulgated by the Architectural and Transportation Barriers Compliance Board ("Access Board"), a body charged with "establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to" Title III of the A.D.A. 29 U.S.C. § 792(b)(3)(B). These regulations, known as the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), provide, in relevant part, as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

Appendix A

28 C.F.R. Pt. 36, App. A, § 4.33.3.

In granting the defendants' motion for summary judgment, the district court held that the language about "lines of sight comparable to those for members of the general public" in § 4.33.3 does not require that wheelchair-accessible seating afford patrons comparable viewing angles to those in non-accessible seating. 142 F. Supp. 2d at 1297-98. The district court followed what was, at the time, the only federal appellate decision in the nation addressing the viewing-angle issue directly: *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000). In *Lara*, the district court had held that, based on the plain language of § 4.33.3, stadium-style seating arrangements like the ones at issue in this case failed to meet the statutory and regulatory requirements:

> "Comparable" simply means capable of being compared; equivalent or similar. . . . [T]he present configuration of the eighteen Tinseltown theaters does not afford wheelchair-bound patrons comparable lines of sight. Either the row designated for wheelchair-bound patrons is too close to the screen, or the screen is too high off the ground, or a combination of both. The average viewing angle from this row is above thirty-five degrees, which the Plaintiffs' expert witness has properly described as "well into the discomfort zone." It should be stressed that this is not some abstract scientific theory which is difficult for the lay person to comprehend. It simply means that a

> person seated in the "wheelchair row" has to lift his or her eyes and/or crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen. . . . The wheelchair-bound patron is denied the full and equal enjoyment of the movie going experience in these eighteen theaters. Therefore, these theaters as presently configured do not conform to the requirements of the Americans with Disabilities Act and Standard 4.33.3.

Lara v. Cinemark USA, Inc., No. EP-97-CA-502-H, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998), at *2. The Fifth Circuit reversed, noting that "questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3." *Lara*, 207 F.3d at 788. Rather, according to the Fifth Circuit, the primary concern animating section 4.33.3 was that wheelchair users have *unobstructed* views, not that they sit at a certain viewing angle to the screen. *Id.* Thus, the court concluded:

> In light of the lack of any evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement, the Board's recent statement that it had not yet decided whether to adopt the DOJ's litigating position with respect to stadium-style theaters, and the common meaning of "lines of sight," we cannot conclude that the phrase "lines of sight comparable" requires anything more than that theaters provide wheelchair-bound patrons with unobstructed

> views of the screen. To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.

207 F.3d at 789.

The district court in this case expressly adopted the Fifth Circuit's reasoning in *Lara*, notwithstanding what it termed the "plain meaning" of § 4.33.3. 142 F. Supp. 2d at 1297. The district court found support for the Fifth Circuit's position in "plaintiff's acknowledgment that the stadium riser design was not adopted for movie theaters until 1995 — four years after Section 4.33.3 was adopted by DOJ." *Id.* Moreover, the court apparently adopted as a matter of law *Lara's* holding that locating the wheelchair-accessible seats only in the non-stadium portion of the theater did not violate § 4.33.3's requirement that the accessible seating be an "integral part of any fixed seating plan" — even though it "[did] not read plaintiffs' First Amended Complaint to state such a theory of liability under the ADA." 142 F. Supp. 2d at 1298 n.3.

The district court rejected the plaintiffs' argument that DOJ's interpretation of § 4.33.3, as articulated in the *Lara* litigation, was entitled to deference. *Id.* at 1297. DOJ had filed an amicus brief in the *Lara* case in which it interpreted § 4.33.3 to require that, in stadium-style theaters, "wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style

seats, adjusted for seat tilt."[5] The district court found that DOJ's interpretation was not entitled to deference because, for the reasons set forth by the Fifth Circuit in *Lara*, it would be "unreasonable and inconsistent with the history of Section 4.33.3 (including statements by the Access Board) to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles." 142 F. Supp. 2d at 1297-98. The district court also expressed skepticism that an amicus brief was an appropriate forum to announce an agency's interpretation of a rule in any case. Accordingly, the district court granted summary judgment to the defendants on the plaintiffs' ADA claim, holding that DOJ's interpretation of § 4.33.3 was inconsistent with the regulation and therefore not entitled to deference. This appeal followed.

II. DISCUSSION

A. *Standard of Review*

A grant of summary judgment is reviewed de novo. *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Accordingly, the appellate court must determine, viewing the evidence in the light most

5. This continues to be DOJ's interpretation, as explained in its amicus brief in this case.

favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Oliver*, 289 F.3d at 626.

B. Analysis

As this Court has observed,

> We owe agency interpretations of their own regulations substantial deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). When the meaning of regulatory language is ambiguous, the agency's interpretation of the regulation controls "so long as it is 'reasonable,' that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-51 (1991) (internal citations and quotations omitted).

Lal v. Immigration & Naturalization Serv., 255 F.3d 998, 1004 (9th Cir. 2001); *see also id.* at 1004 n.3 (explaining that the assessment of an agency's interpretation of a regulation, as opposed to a statute, presents a different question from the *Chevron* line of cases); *Simpson v. Hegstrom*, 873 F.2d 1294, 1297 (9th Cir. 1989) ("We generally defer to an administrator's interpretation of her own regulations unless it is 'plainly erroneous or inconsistent with the regulation.' ").

In this case, the district court concluded that DOJ's interpretation[6] of § 4.33.3 is so inconsistent with the regulation as to preclude deference — that is to say, that DOJ's interpretation is unreasonable. That conclusion is unwarranted. The language at issue is § 4.33.3's reference to "lines of sight comparable to those for members of the general public." Webster's Third New International Dictionary defines "line of sight," in relevant part, as "a line from an observer's eye to a distant point (as on the celestial sphere) toward which he is looking or directing an observing instrument." *Id.* at 1316 (1993); *see also* Webster's Ninth New Collegiate Dictionary 695 (1991) (same). In the context of a movie theater, this means a line extending from the viewer's eye to the points on the screen where the film is projected, taking into account the angle from the viewer's eye to those points. In its engineering guideline, promulgated in 1994, the SMPTE explained:

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6. Insofar as the district court suggested that an agency interpretation first advanced in an amicus brief is somehow less valid or less entitled to deference than one promulgated elsewhere, this is a position without legal support. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (analyzing the Secretary of Labor's interpretation of a rule articulated in an amicus brief, holding that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' "); *see also id.* (characterizing this standard as "deferential," and noting that the phrase at issue "comfortably bears the meaning the Secretary assigns"); *Navellier v. Sletten*, 262 F.3d 923, 945 (9th Cir. 2001) ("An agency's interpretation of one of its own rules, including an interpretation expressed in an *amicus* brief, is controlling unless plainly erroneous or inconsistent with the rule.").

Appendix A

> In addition to ensuring that everyone will see well, seating in the effective cine theater must avoid physical discomfort, which occurs when the vertical viewing angle to the top of the screen image is excessive or the lateral viewing angle to the centerline of the screen requires uncomfortable head and/or body position. Since the normal line of sight is 12° to 15° below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35°, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15°.

SMPTE Engineering Guideline at 4-5. Indeed, the National Association of Theatre Owners ("NATO"), participating in this case as amicus curiae on behalf of the appellees, has advanced a similar conception of "viewing angle." Steven John Fellman, *NATO Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums 6* (1994) ("NATO explained that lines of sight are measured in degrees. . . .").[7]

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7. We disagree with the Fifth Circuit's suggestion in *Lara*, 207 F.3d at 789, that it is impossible to parse "comparability" without embarking on subjective judgments of where each individual prefers to sit in a movie theater. The point is this: Able-bodied movie theater patrons in a stadium-style theater may choose from a wide range of viewing angles, most of which are objectively comfortable according to SMPTE standards, regardless of what personal viewing preferences individuals may have *within* that comfortable range. As it currently

(Cont'd)

The question here, then, is whether it is unreasonable for DOJ to interpret "comparable line of sight" to encompass factors in addition to physical obstructions, such as viewing angle. The answer, in light of the plain meaning of the regulation both in general and as understood in the movie theater industry, is "no." We do not accept the *Lara* court's suggestion[8] that the legislative and administrative history of § 4.33.3 compels a different answer.[9] We agree that

(Cont'd)

stands in the theaters at issue, however, wheelchair-bound patrons may sit only in the first few rows, where uncontroverted evidence demonstrates that, not only is the viewing angle objectively uncomfortable for all viewers, but the discomfort is exacerbated for wheelchair-bound viewers relative to able-bodied viewers sitting in the same row. Note that the SMPTE has determined that physical discomfort occurs "for most viewers" when the viewing angle exceeds 35 degrees; the *average* vertical viewing angle for disabled patrons in the subject theaters is 42 degrees. Thus, there is objective evidence that disabled patrons would likely experience discomfort in the theaters in question.

8. Nor are we alone in so doing. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 88 (D. Mass. 2003) ("This Court now rules (notwithstanding the contrary reasoning in the *Lara* decision) that the comparable 'lines of sight' requirement of Section 4.33.3 means that viewing angles must be taken into account.").

9. The Fifth Circuit's reasoning in *Lara*, and the district court's adoption of that reasoning in this case, seems particularly specious in light of the Supreme Court's recent pronouncement on attempts to circumvent plain meaning in construing administrative interpretations. *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Danny Keffeler*, __ U.S. __, 123 S. Ct.

(Cont'd)

stadium-style movie theaters were rare in this country until the mid-1990s, and the older theaters, which were built on sloping floors, did not generally create the same kinds of dramatic disparities in vertical viewing angles that stadium-style theaters do. But the fact that DOJ may not have been contemplating viewing-angle issues in the context of stadium-style seating at the time when § 4.33.3 was promulgated is not dispositive. Rather, the issue is whether a broadly-drafted regulation — with a broad purpose — may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated — a question that the Supreme Court has answered in the affirmative. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (holding that, where statutory text is unambiguous, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted) (citing *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))). We see no reason to treat regulations differently.

III. CONCLUSION

One of the central goals of Title III of the ADA is to ensure that people with disabilities have access to "the full and equal enjoyment of the goods, services, facilities, privileges,

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(Cont'd)

1017, 1026 (2003) ("While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading 'other legal process' in abstract breadth.").

advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). In the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose. We find it simply inconceivable that this arrangement could constitute "full and equal enjoyment" of movie theater services by disabled patrons. Yet, in rejecting DOJ's interpretation, this is precisely what the district court in this case held: No matter where in the theater the seats are, and no matter how sharp the viewing angle, so long as there is no physical object standing between the disabled patron and the screen, DOJ is not free to interpret its own regulation as requiring anything more.

We hold that DOJ's interpretation of "lines of sight comparable to those for members of the general public" in § 4.33.3 to require a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats is valid and entitled to deference. Accordingly, the judgment of the district court is reversed, and the case is remanded with instructions to enter summary judgment in favor of the plaintiffs on their ADA claim.

REVERSED AND REMANDED.

Appendix A

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The majority sets up a conflict with the Fifth Circuit,[1] adopts an unreasonable construction of the applicable regulation, and puts theater owners in a position of impossible uncertainty as to what they must do to comply with the law.

Evidently the Justice Department has been unable to sell its litigation position within the executive branch, so it has come to the Ninth Circuit. The statute requires that "[s]tandards included in regulations . . . shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board,"[2] called the "Access Board." The Access Board published a Notice of Proposed Rulemaking in 1999 that it was considering promulgating new regulations for "stadium-style motion picture theaters" because of the frequent placement of wheelchair spaces in the first few rows.[3]

The Access Board notes that "DOJ has asserted in attempting to settle particular cases" that the usual wheelchair placement should be changed to give wheelchair patrons sight lines "equivalent to or better then the viewing angles provided by 50 percent of the seats in the auditorium," by elevating

1. *See Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000).

2. 42 U.S.C. § 12186(c).

3. 64 Fed. Reg. 62,248 62,278 (Nov. 16, 1999).

the wheelchair seats to the stadium section.[4] Far from announcing that DOJ was right about what the existing regulation meant, the Access Board announced that "the Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation."[5] The Board notes the desirability of affording better sight lines to wheelchair patrons, but also notes that "design professionals have expressed some uncertainty about how to measure their compliance."[6] Balancing these concerns, "the Board is proposing to amend the guidelines to include specific technical provisions" governing sight lines.[7]

It is striking to contrast the just approach of the Access Board with the unjust approach of the majority decision. When and if the Access Board promulgates a regulation, architects will know before a movie theater is built how they must design it, and owners of existing theaters will know what reconstruction they must perform. By contrast, under today's decision, retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time. They must rebuild them to satisfy the architectural inferences design

4. *Id.*

5. *Id.*

6. *Id.* at 62,217.

7. *Id.*

professionals will have to draw from today's opinion. Those inferences are obscure and debatable. Though I could come up with a scheme that I think could satisfy the implications of the majority opinion, I am not sure that it would satisfy the majority, and I am entirely unable to say what is the least expensive design that would satisfy the majority. If a judge on the panel cannot say just what is required, how can a movie theater owner? It is irresponsible to impose on the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done.

We ought to leave the Access Board process alone. If the Access Board adopts the Justice Department's position or something like it, the requirements will be clear, precise and prospective. Though any result might be subject to substantive objections (it is hard to justify a gloss on the statute that requires wheelchair users to have a *better* view than half or more of the seats), at least the result would be obtained after a fair process. Regulating movie theater architecture retroactively by vague judicial fiat is unjust.

The Access Board implicitly acknowledges that the Justice Department is arguing for creation of new law rather than a permissible construction of existing regulations. And the structure of the existing regulations and the timing of the regulation at issue compel this conclusion. The "accessibility guidelines" surrounding § 4.33.3 — the one covering lines of sight — are written with great precision, e.g., telephone cord length must be at least 29",[8] and wheelchair seating knee clearance at tables and counters

8. 28 C.F.R. Part 36, App. A, § 4.31.8.

must be "at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep."[9] Where a regulation tells movie architects and owners to the millimeter how they must construct knee space, the use of the vague term "comparable" must be looser by intent. It is unreasonable to infer from the regulation on the next page, "lines of sight comparable to those for members of the general public,"[10] something like the "better than 50%" of the seats rule that the Justice Department has suggested.

The majority is rightly troubled by the notion of a wheelchair ghetto in one part of the movie theater with sight lines worse than those of the other patrons. But that concern is a chimera, because the regulation already speaks to that issue. It says that "[w]hen the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location,"[11] and in all theaters, the wheelchair seating has to be an "integral part" of the seating with "lines of sight comparable to those for members of the general public." That means that in the smaller theaters, it is permissible to group the wheelchair seating rather than to distribute it throughout the theater, but that it has to be part of the general seating footprint rather than separated, and the lines of sight cannot be substantially different from those of seats available for the general public. Under the existing regulations, there cannot be a wheelchair ghetto out of the way, behind a post, or off to the side.

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9. *Id.* at § 4.32.3.

10. *Id.* at § 4.33.3.

11. *Id.*

Appendix A

The regulation at issue, in contrast with the highly specific (to the millimeter) requirements of the surrounding regulations, requires that wheelchair areas be "an integral part" of the fixed seating plan, that they "adjoin an accessible route" that also series as an emergency exit, that they be adjacent to "companion" seating, and that they have "lines of sight comparable to those for members of the general public."[12] The majority opinion disregards all the other requirements that give context to the lines of sight requirement, such as the access and emergency exit requirements. These other requirements complicate any construction plans. The "integral part" requirement prohibits a separate and noncontiguous wheelchair ghetto, the companion seating provision prohibits separation of the disabled from friends and family, and the access route provision assures that the disabled can get in and out of the movie theater conveniently and safely (which may require that they be in the flat area in front).

What this case is really all about is the meaning of the word "comparable" in the "lines of sight" regulation. The regulation uses "comparable" in its sense of "similar or equivalent."[13] The question is, "comparable to what?" Evidently the Justice Department position is that "comparable" means "equivalent to or better than the viewing angles . . . provided by 50 percent of the seats."[14] That may or may not be a

12. 28 C.F.R. Part 36, App. A, § 4.33.3.

13. *The American Heritage Dictionary* 300 (2d ed. 1982).

14. 64 Fed. Reg. 62,248 62,278 (Nov. 16, 1999).

reasonable imposition on theater owners, but it is not a natural usage of the word "comparable." "Comparable" does not mean "better than." It means "similar or equivalent." And why "50 percent of the seats?" Why not just "comparable to the viewing angles provided by non-wheelchair seating?" That would be a more natural interpretation of the word "comparable."

Viewing angles differ for every seat in the house. As the Fifth Circuit noted, preferences are highly subjective, and people's preferences differ.[15] Some people like to sit in front, for maximum size of picture and stereo effect of the sound, and to avoid distractions from people in front of them. Some people like to sit in back, for the greater height and sense of separation from the picture. Some like the aisles, so they can get out easily to go to the bathroom or the popcorn stand. Some like the center, so they won't be distracted by the people who get up during the movie to go the bathroom or the popcorn stand. The lines of sight for the wheelchair seats cannot be comparable to all of these, without requiring the scattering of wheelchair seating that the 300-seat provision expressly avoids requiring in small theaters. The wheelchair seats up front are comparable (though as a matter of geometry a line of sight will not be identical to any particular other seat) to the other seats up front, preferred by those patrons who like to sit up front. If the seats up front, or in the back, were uniformly considered undesirable, theaters would have to charge less for them. They don't.

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15. *Lara*, 207 F.3d at 789.

The Fifth Circuit solves this problem by interpreting the line of sight requirement as requiring an unobstructed view.[16] Whether we adopt precisely that reading or not, the regulation plainly does not mean what the Justice Department says it means (and what the majority opinion may or may not imply that it means): "equal to or better than 50 percent of the seats," whatever "better" may mean.

The Fifth Circuit went the other way from the majority in *Lara*, so now we have a circuit conflict. Theater owners in the Ninth Circuit have no guidance from the majority on how to build their theaters, other than to stop doing what they are doing now. A purportedly uniform federal regulation now means something different in the Ninth Circuit from what it means in the Fifth.

Perhaps responding to my concern that a theater owner cannot read the majority opinion and figure out what to do to obey the law, the majority says that the viewing angle for wheelchair seating has to be "within the range of angles offered to the general public." This is evidently the meaning the majority attributes to the words of the regulation, "lines of sight comparable to those for members of the general public."[17] But the majority's gloss on the regulation, besides being something different from what the regulation says, is no help at all to theater owners trying to comply with the law. "[W]ithin the range of angles" does not speak with more clarity than "comparable."

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16. *Id.*

17. *Id.*

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The seating in the theaters before us already does provide wheelchair viewing angles "within the range of angles offered to the general public," so the words the majority uses cannot mean what they say, since the majority directs summary judgment against the theaters. The affidavits establish that because wheelchairs cannot roll up steps, the theaters provide spaces for them "on a flat portion of each auditorium, near the entrance-ways and exits, in front of the tiered seats, amidst seating for the general public." The wheelchair spaces in the challenged theaters "are in one or more of the first five rows." The regular seats right next to the wheelchair spaces provide viewing angles "within the range" of the general seating. The vertical angles are identical. Where there are regular seats to the left and right of a wheelchair seat, it is a geometric certainty that the angle of view from the wheelchair seat will be greater than the angle from one, and less than the angle from the other, so that it is necessarily "within the range of angles" of the two adjacent seats. Of course the theater cannot command the manufacturers of wheelchairs to give them all the same reclining angles as theater seats, and there may be important medical reasons why some wheelchair users would not want that, so to the extent the majority is alluding to its neck-craning concern, that is out of the theater's control. The wheelchair manufacturer and purchaser in substantial part control the vertical viewing angle, and the wheelchair space provided by the movie theater controls the horizontal angle.

Those who use wheelchair spaces in a movie theater bring their own chairs.

All the majority tells us with any clarity is that it is not satisfied with the existing state of affairs, where wheelchair

patrons sit in the front rows. But architects and theater owners need to know, not only what the Ninth Circuit rejects, but what construction and reconstruction will be acceptable. That is why the regulations delimit knee space to the millimeter. Judicial opinions cannot be written that way, which is a good reason why we should not try to rewrite the regulations as the majority does. The majority admits that stadium seating was a "factual scenario not expressly anticipated at the time the regulation was promulgated,"[18] yet construes the regulation to address it. If the regulation did not contemplate stadium seating, the only fair inference is that it did not provide specially for it. Obviously, there was wheelchair seating before stadium seating, and if the regulations did not prohibit a wheelchair section in the front of the theater before, it is impossible to justify a construction that the very same regulation prohibits the very same wheelchair seating, with identical angles of view, after stadium seating came into use.

The least the majority could do in its retroactive legislative effort is offer a holding that can be translated into a floorplan. Today's holding cannot, not least because in theaters where there are seats on both sides of the wheelchair spaces, the result treats as violated a rule that is mathematically certain to have been complied with. What we should do, of course, is conclude as the Access Board evidently has, that the regulation does not now mean what the Justice Department wants it to mean. We know perfectly well that the Access Board is addressing wheelchair spaces and stadium seating, and there is no justification for jumping in front of them.

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18. Majority Opinion at 11253.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED APRIL 30, 2001 AND FILED MAY 1, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 00-485-KI

OREGON PARALYZED VETERANS OF AMERICA, a non-profit corporation, KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Plaintiffs,

v.

REGAL CINEMAS, INC., and EASTGATE THEATRE INC., d/b/a ACT III THEATERS, INC.

Defendants.

OPINION

KING, Judge:

Before the court is the motion for summary judgment (#35) by plaintiffs Oregon Paralyzed Veterans of America, Kathy Stewmon, Tina Smith, and Kathy Braddy. Also before the court is the motion for summary judgment (#37) by defendants Regal Cinemas, Inc. and Eastgate Theatre, Inc., dba Act III Theaters, Inc. (collectively, "Regal"). For the reasons set forth below, I grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment.

Appendix B

FACTS

In 1995, Regal began constructing "stadium-style" movie theaters. Stadium-style theaters roughly emulate the seating configuration of a typical sports stadium, providing stepped-seating that rises at a slope of well over five percent. This elevated seating configuration reduces the obstructed view or line-of-sight problems that occur, for example, when a tall individual sits in front of a shorter individual.

The stairs that support the stadium-style seating configurations require a steep grade that generally cannot be navigated by wheelchair-using patrons. Wheelchair-accessible seating is located in front of the tiered seats amidst the seating for the general public in the first five rows of seats. The wheelchair seat locations have an unobstructed view of the movie screen.

In this lawsuit, plaintiffs challenge the wheelchair seat locations in theaters within six theater complexes in northern Oregon owned by Regal. These six complexes have between nine and sixteen theaters and the majority of the theaters have less than 250 seats. Certificates of occupancy and other approvals were issued for each of the theaters by local and state building officials.

Plaintiffs allege that the wheelchair seat locations are in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* ("ADA"). They also assert a claim under an Oregon public accommodation law (ORS 659.425(3)) and the common law tort of negligence.

Appendix B

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), *cert. denied*, 120 S. Ct. 375 (1999).

DISCUSSION

I. *ADA Claim*

As a "public accommodation," Regal's theaters are subject to the requirements of Title III of the ADA. The general rule of Title III provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Newly constructed facilities subject to the ADA must be "readily accessible to and usable by

individuals with disabilities." *Id.*, § 12183(a)(1). Congress has directed the Department of Justice ("DOJ") to "flesh out" these general principles by "issu[ing] regulations . . . that include standards applicable to facilities" covered by Title III. *Id.*, § 12186(b); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998). DOJ fulfilled this responsibility by adopting guidelines promulgated by the Architectural and Transportation Barriers Compliance Board, known as the "Access Board." The Access Board is charged with "establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to," Title III of the ADA. 29 U.S.C. § 792(b)(3)(B). The regulations adopted by the DOJ are known as the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").

One of the guidelines promulgated by the Access Board, and adopted by DOJ as its own regulation in 1991, states in relevant part as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable* to those for members of the general public.

28 C.F.R. Part 36, App. A, § 4.33.3 (emphasis added).[1]

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1 The State of Oregon's accessibility guidelines, contained in the Uniform Building Code ("UBC"), contain very similar requirements. UBC, § 1109.20.1.1.

Appendix B

At the center of this lawsuit is the meaning of "lines of sight comparable" in Section 4.33.3. Plaintiffs argue that these words impose a viewing angle standard such that wheelchair seating areas must be placed in the stadium seating portion of theaters and not just in the front rows of a theater that provide inferior and uncomfortable viewing angles. Defendants argue that these words do not impose a viewing angle standard and mean only that a patron in a wheelchair must be provided with an unobstructed view of the movie screen.

To date, the major court decisions that have construed "lines of sight comparable" in Section 4.33.3 have addressed the question of whether those words impose a requirement that wheelchair users not have their views obstructed by spectators who may stand in front of them. *Paralyzed Veterans*, 117 F.3d at 583-84 (holding that Section 4.33.3 does require auditorium owners to provide wheelchair areas that have lines of sight unobstructed by standing spectators); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (holding that Section 4.33.3 "does not purport to decide whether lines of sight over standing spectators are-or are not-necessary in order to comply with the ADA"); *Caruso v. Blockbuster-Sony Music Entertainment Ctr. at the Waterfront*, 193 F.3d 730, 736 (3rd Cir. 1999) (holding that Section 4.33.3 does not reach the issue of sight lines over standing spectators). Only one appellate decision has addressed the issue of whether "lines of sight comparable" requires stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles rather than unobstructed lines of sight. That case is *Lara v. Cinemark USA Inc.*, 207 F.3d 783 (5th Cir. 2000).

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In July 1998, DOJ filed in the *Lara* case an *amicus curiae* brief. In its brief, the DOJ announced a new interpretation of Section 4.33.3, based on its reading of the plain meaning of "comparable lines of sight." The interpretation required the following in stadium-style theaters: "wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt." Defendants' Exh. L, p. 8.

The district court granted summary judgment in favor of the plaintiffs and the defendant appealed that decision. On appeal, DOJ again filed an *amicus* brief espousing its new interpretation of Section 4.33.3 with respect to wheelchair locations in stadium-style theaters.

On April 6, 2000, the Fifth Circuit issued its opinion in the *Lara* case and reversed the district court. On October 16, 2000, the Supreme Court denied the plaintiffs' petition for writ of certiorari. *Lara v. Cinemark USA, Inc.*, 121 S. Ct. 341 (2000).

Notwithstanding the Fifth Circuit's rejection of the DOJ's litigating position in *Lara*, plaintiffs essentially adopt DOJ's litigating position as their own in this case. They ask that I view DOJ's litigating position in the *Lara* case as its latest interpretation of Section 4.33.3 and also ask that I pay deference to that interpretation.

Before launching into a discussion of whether deference is due to DOJ's interpretation of Section 4.33.3 as announced in the *Lara v. Cinemark* litigation, I believe it is important to

emphasize that neither the district court nor the Fifth Circuit analyzed the issue in such a way. The district court reasoned that:

> [T]he statute and regulation appear to be clear and unambiguous, and the words thereof can be interpreted in their common, ordinary, English language, dictionary meaning. "Comparable" simply means capable of being compared; equivalent or similar. The Plaintiffs contend that this language means that the wheelchair-bound patrons should and must be afforded seating providing lines of sight at least similar to those afforded to the average person of the theater rather than being relegated to the worst seats in the house. * * * The Court agrees with the Plaintiffs' interpretation of the word "comparable" as used in the regulation. . . .

Lara v. Cinemark USA, Inc., 1998 WL 1048497, *2 (W.D. Tex).

On this basis, and without any discussion of the history of Section 4.33.3, the court concluded that the viewing angles provided by the wheelchair seating at issue in the case did not provide "comparable lines of sight" as required by Section 4.33.3. *Id.*

In rejecting the district court's "plain meaning" analysis, the Fifth Circuit in *Lara* examined the history of Section 4.33.3. The court noted that, unlike questions of "viewer obstruction," which DOJ and the Access Board explicitly considered before issuing Section 4.33.3, questions regarding

"viewing angle" did not arise until well after DOJ adopted Section 4.33.3. *Lara*, 207 F.3d at 788. The court went on to note that such a distinction is evident in DOTs 1994 Technical Assistance Manual (and its supplement) which explicitly requires certain auditoria to provide "lines of sight over spectators who stand," but says nothing about viewing angles. *Id.* The court also emphasized that the Access Board's recent (1999) proposed modifications to Section 4.33.3 were in the context of obstructed views rather than viewing angles and that the Access Board had considered in 1999 the possibility of amending Section 4.33.3 to add requirements that would codify. DOJ'S position that Section 4.33.3 imposes viewing angle standards in stadium-style theaters. *Id.* Finally, the court noted that, in other statutory contexts at the time DOJ adopted Section 4.33.3, the phrase "lines of sight" meant unobstructed view. *Id.* at 788-89. The court concluded:

> In light of the lack of any evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement, the Board's recent statement that it had not yet decided whether to adopt the DOJ's litigating position with respect to stadium-style theaters, and the common meaning of "lines of sight," we cannot conclude that the phrase "lines of sight comparable" requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen.

Id. at 789.

As tempting as it is to rely on the "plain meaning" of the regulation, I find the reasoning of the Fifth Circuit in *Lara* to be persuasive, given its reliance on the history of Section 4.33.3 and the context in which it was promulgated. The logic of the decision is amplified by plaintiff's acknowledgment that the stadium riser design was not adopted for movie theaters until 1995-four years after Section 4.33.3 was adopted by DOJ. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 3.

The *Lara* court's reasoning is also dispositive of plaintiffs' argument that I should show deference to DOJ's interpretation of Section 4.33.3.[2] An agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905 (1997). Under this standard, the applicable analysis is similar to that applied to an agency's interpretation of an ambiguous statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *See Paralyzed Veterans*, 117 F.3d at 584 ("After all, *Chevron* requires a reviewing court to affirm a permissible (or reasonable) interpretation of an ambiguous statute, and we very much doubt that we would

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2. I acknowledge defendants' argument that the viewing angle standard that plaintiff advocates is different from what DOJ asserted in the *Lara v. Cinemark* litigation and that DOJ has articulated different viewing angle standards at different times. Because I find that no viewing angle standard is imposed by Section 4.33.3, I do not reach this "moving target" argument. I do note, however, that the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule.

defer to an unreasonable agency interpretation of an ambiguous regulation."). Assuming DOJ'S litigating position in the *Lara v. Cinemark* litigation is a suitable way to announce an interpretive rule, the Fifth Circuit's analysis in *Lara* demonstrates that it would be unreasonable and inconsistent with the history of Section 4.33.3 (including statements by the Access Board) to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles. *See Caruso*, 193 F.3d at 736 (rejecting DOJ's interpretation in 1994 Technical Assistance Manual because of indications that the agency had a different intent (based on comments by the Access Board) at the time Section 4.33.3 was promulgated); *Independent Living Resources*, 982 F. Supp. at 742 (same). Summary judgment is granted against plaintiffs' ADA claim.[3]

II. *Claim Under ORS 659.425(3)*

Plaintiffs allege that "[b]y failing to provide wheelchair seating with lines of sight that are comparable to that of the general public, Defendants have made a distinction,

3. This ruling encompasses plaintiffs' argument that the wheelchair seats are not "an integral part of any fixed seating plan" in the theaters at issue. 28 C.F.R Part 36, App. A, § 4.33.3. I do not read plaintiffs' First Amended Complaint to state such a theory of liability under the ADA. Regardless, the argument is belied by the Fifth Circuit's holding in *Lara* that, to locate wheelchair seating in the non-stadium portion of seats used by the general public, does not violate the ADA. *Lara*. 207 F.3d at 789. I also reject plaintiffs' reliance on the "full and equal enjoyment" language in 42 U.S.C. § 12182(a). Instead, I subscribe to defendants' argument that compliance with ADAAG (the implementing regulations for the ADA) is compliance with the ADA itself.

discrimination or restriction on Plaintiffs because they are disabled persons, in violation of ORS 659.425(3)." First Amended Complaint, ¶ 51. That statute provides: "It is an unlawful practice for any place of public accommodation, resort or amusement as defined in ORS 30.675, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is a disabled person."

As defendants point out, the Honorable Donald C. Ashmanskas ruled in *Independent Living Resources* that this statute was not intended to provide a right to recover damages for deficiencies in the design of a structure and that "the language of the statute . . . suggests active conduct of some sort, especially conduct that is targeted at a specific individual." *Independent Living Resources*, 982 F. Supp. at 773. Likewise, the Honorable Robert E. Jones has ruled that the statute does not impose a "reasonable accommodation" requirement for public accommodations. *Sellick v. Denny's Incorporated* 884 F. Supp. 388, 393 (D. Or. 1995). As recently as January 2000, the Honorable Dennis J. Hubel relied on these decisions to dispose of a claim under ORS 659.425(3). *Alford v. City of Cannon Beach*, 2000 WL 33200554, * 14-15 (D. Or. January 17, 2000). I am inclined to follow these decisions from this district and, accordingly, grant summary judgment against plaintiffs' claim under ORS 659.425(3).

III. *Negligence Claim*

Plaintiffs assert that "[d]efendants had a duty, imposed by federal and state law, to design, construct and operate their

theaters in compliance with Title III of the ADA and the State Public Accommodations Law." First Amended Complaint, ¶ 58. However, in their response to defendants' motion for summary judgment, plaintiffs concede that "the ADA's regulatory scheme is broad enough to preclude Plaintiff from seeking recovery on a negligence claim for violation of the ADA." Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 18. Furthermore, based on the above analysis, the "public accommodation law" on which plaintiffs rely (ORS 659.425(3)) does not apply and, thus, cannot supply the duty element necessary for plaintiffs' negligence claim.

Plaintiffs attempt to get around these problems by arguing in their opposition brief that it is actually the Uniform Building Code that supplies the necessary duty element. However, plaintiffs are unable to identify any particular building code standard, in effect at the time of the construction of the theaters, that was not satisfied. Plaintiffs' claim also suffers from the fact that none of plaintiffs can claim a physical injury. *See Alford*, 2000 WL 33200554, *19. Summary judgment is granted against plaintiffs' negligence claim.

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CONCLUSION

Based on the foregoing, the motion for summary judgment (#35) by plaintiffs Oregon Paralyzed Veterans of America, Kathy Stewmon, Tina Smith, and Kathy Braddy is DENIED. The motion for summary judgment (#37) by defendants Regal Cinemas, Inc. and Eastgate Theatre, Inc., dba Act III Theaters, Inc. is GRANTED.

DATED this 30th day of April, 2001.

s/ Garr M. King
GARR M. KING
United States District Judge

APPENDIX C — STATUTORY PROVISIONS AND REGULATIONS INVOLVED

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 U.S.C. § 12183

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

> **(1)** a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter;

* * * *

Appendix C

42 U.S.C. § 12186

§ 12186. Regulations

* * *

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a

valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

* * * *

Appendix C

42 U.S.C. § 12204

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

* * * *

Appendix C

42 U.S.C. § 12206

§ 12206. Technical assistance

(a) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of Title 5 (commonly known as the Administrative Procedure Act).

* * * *

Appendix C

AMERICANS WITH DISABILITIES ACT ACCESSIBILITY GUIDELINES

4.33.3 Placement of Wheelchair

Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be *provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. *At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.*

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

* * * *

Appendix C

PROPOSED RULES

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1190 and 1191

[Docket No. 99–1]

RIN 3014–AA20

Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines

Tuesday, November 16, 1999

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) is proposing to revise and update its accessibility guidelines for buildings and facilities covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). These guidelines cover new construction and alterations and serve as the basis for enforceable standards issued by other Federal agencies. As a result of this revision and update,

the guidelines for the ADA and ABA are consolidated in one Code of Federal Regulations part. The guidelines for the ABA also cover buildings and facilities leased by Federal agencies. The Department of Justice and the Department of Transportation are responsible for issuing standards based on the Access Board's guidelines under the ADA. ABA standards are issued by the Department of Defense, General Services Administration, the Department of Housing and Urban Development, and the U.S. Postal Service.

* * *

The Board is aware of the Department of Justice's enforcement of 4.33.3 with respect to assembly areas with stadium-style seating. DOJ has stated that 4.33.3 requires that wheelchair areas be an integral part of any fixed seating plan, and be proved so that people with disabilities have lines of sight and choice of admission prices comparable to those for other members of the general public. As applied to stadium-style theaters (where most seats are placed on tiers or risers to enhance viewing), DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor or other area within the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles that are equivalent to or better than

the viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters.

* * * *

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DISTRICT IN *UNITED STATES OF AMERICA v. CINEMARK USA, INC.* DATED NOVEMBER 19, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:99 CV- 705

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.

Defendant.

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This case arises under Title III of the Americans with Disabilities Act (the "ADA") and is before the Court upon cross motions by the parties for summary judgment. Defendant Cinemark USA, Inc. ("Cinemark") filed its second motion for summary judgment on December 11, 2000 (docket no. 70). Plaintiff, the United States, filed a cross motion for partial summary judgment on January 18, 2001 (docket no. 78). For the reasons stated below, the government's motion for partial summary judgment is DENIED. Defendant's second motion for summary judgment is GRANTED.

Appendix D

Facts

The following facts are not in dispute. Cinemark is a Texas corporation that constructs, owns and operates movie theater multiplexes throughout the United States. In 1995, Cinemark began constructing and operating "stadium-style" movie theaters. Stadium style theaters roughly emulate the seating configuration of a typical sports stadium, providing "stepped seating" that rises at a slope of over five percent. This elevated seating configuration eliminates the "obstructed" view problems that occur, for example, when a tall individual sits in front of a shorter individual. By contrast, traditional style seating is placed on a sloped floor.

Cinemark operates stadium-style theaters nationwide, including in Ohio. Cinemark currently operates 71 stadium-style movie theater multiplexes throughout the United States, each of which contains between 7 and 24 screens. Cinemark provides wheelchair accessible seating in its stadium-style theaters, but not as part of the stadium seating configuration. Wheelchair accessible seating in Cinemark's stadium-style theaters is located on a flat portion of each theater near the front of the seating area, generally at or about the third row of the theater. The wheelchair accessible seating is in front of the tiered, "stadium-style" seats.[1] The wheelchair seating is placed near entranceways and exits.

The government filed this action against Cinemark on March 24, 1999, alleging that Cinemark's stadium-style

1. In Cinemark's stadium style movie theater auditoriums with 300 or more seats, wheelchair seating is also provided via elevator access to seats at the rear of the theater.

theaters deny access to persons with disabilities who use wheelchairs in violation of Title III of the ADA and its implementing regulations. The government seeks a declaration that Cinemark has violated the ADA in the design and construction of its movie theaters in Ohio and throughout the United States; an order that Defendant undertake repairs of its stadium-style theaters to bring them into compliance with the ADA; an injunction against Cinemark from taking any further action in designing or constructing stadium-style theaters that do not comply with the ADA, a civil penalty, and compensatory damages for those persons with disabilities who were discriminated against by Cinemark. (Complt. Prayer for Relief.)

Cinemark denies that its theaters violate the ADA.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.*

The moving party has the initial burden of proving that no genuine issue of fact exists and that the moving party is entitled to judgment as a matter of law. To meet this burden, the moving party may rely on any of the evidentiary sources listed in Rule 56(c) or may merely rely upon the failure of the nonmoving

party to produce any evidence which would create a genuine dispute for the jury. If the moving party satisfies its burden, then the burden of going forward shifts to the nonmoving party to produce evidence that results in a conflict of material fact to be resolved by a jury. A scintilla of evidence in support of the nonmoving party's position is not enough. There must be evidence from which a reasonable jury could find for the nonmoving party. If the evidence is insufficient to reasonably support a verdict in favor of the nonmoving party, the motion for summary judgment will be granted. In considering a motion for summary judgment, the Court must afford all reasonable inferences, and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dept. of Transportation*, 53 F.3d 146, 149-150 (6th Cir. 1995).

Discussion

The government moves for partial summary judgment only with respect to "Cinemark auditoriums with both stadium-style and traditional seating, where all wheelchair accessible seating is provided in the non-stadium style section, *i.e.*, in auditoriums that seat fewer than 300 persons." (Gov. Mem. at 2.)[2] The government contends these theaters violate Title III of the ADA and its implementing regulations.[3]

2. Although the government does not specifically identify which of Cinemark's theaters are of this type, Cinemark submits affidavit testimony that only its "first generation" theaters fall within this description. (Supp. Harton Aff. Ex. B ¶ 4.) All of Cinemark's "first generation" theater complexes were approved, fully constructed and opened for business by March 1998. *Id.*

3. There is no dispute that Cinemark's stadium-style theaters are "public accommodations" subject to Title III of the ADA.

First, the government contends Cinemark's theaters violate Section 302 of the ADA. Section 302(a) provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Section 302(b) of the ADA sets forth a number of acts and omissions which constitute discrimination under Section 302(a), including affording individuals with disabilities "the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals" and providing individuals with disabilities "a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals. . . ." 42 U.S.C. § 12182(b)(ii), (iii). Section 302(B) requires that goods, services and facilities "be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(B).

The government asserts that Cinemark's placement of wheelchair accessible seating only in traditional seating on the sloped portion of theater near the front of the theater violates these provisions. It contends that the seating provided

to wheelchair patrons is unequal and inferior to the stadium-style seats offered non-wheel chair patrons. In particular, the government asserts that stadium-style seating provides superior sightline advantages not available in traditional seats. Thus, wheelchair patrons who go to Cinemark's theaters pay the same administration price as non-disabled patrons, but must chose a seat in the front of the theater where the viewing angle to the screen is not as comfortable as in the stadium-style seats. The government states:

> [P]atrons who use wheelchairs must sit near the front of the auditorium, close to the wall-to-wall screen, and separated from most of the general public seated behind them on the elevated risers of stadium seating. When the movie begins, these patrons are forced to shift in their chairs, tilt their heads back at an uncomfortable angle, or move their heads from side to side many times per minute in order to capture the action on the enlarged stadium theater screen directly in front of them.

(Gov. Mem. at 21.)

The government also contends Cinemark's theaters violate Section 303 of the ADA and its implementing regulations. Section 303 of the ADA pertains to new construction and alterations in public accommodations. *See* 42 U.S.C. § 12183. Section 303 provides that it shall be discriminatory under the ADA to design and construct public accommodations and commercial facilities that fail to comply with standards issued by the Department of Justice. 42 U.S.C.

§ 12183(a)(1). Congress expressly charged the DOJ with responsibility for issuing final regulations that include accessibility standards for newly constructed and altered places of public accommodation and commercial facilities. 42 U.S.C. § 12186(b). In Section 504 of the ADA, Congress required the Architectural and Transportation Barriers Compliance Board (the "Access Board") to issue guidelines to provide guidance to the DOJ in establishing those standards: 29 U.S.C. § 792(b). The ADA requires the DOJ's standards to be consistent with the Access Board's guidelines. 42 U.S.C. § 12186(c).

On July 26, 1991, the Access Board published the Americans with Disabilities Act Accessibility Guidelines, known as "the ADAAG" 56 Fed. Reg. 35408, 36 C.F.R. Part 1191. On the same day, the DOJ published final regulations implementing Title III of the ADA, which incorporated the ADAAG without revision. 28 C.F.R. Part 36.

Section 4.33.3 of the ADAAG pertains to the placement of wheelchairs and provides:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be

> installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having slope lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. Ch. I, Pt. 36, App. A, § 4.33.3.

The government contends Cinemark's theaters violate the requirements of Section 4.33.3 that wheelchair areas "be an integral part of any fixed seating plan" and provide people with disabilities "lines of sight comparable to those for members of the general public."

The government asserts that to be an integral part of the fixed seating plan as required by Section 4.33.3, a wheelchair space in a stadium style theater must "be part of the auditorium seating where members of the public routinely sit." (Gov. Mem. at 24.) The government asserts that "[i]n stadium-style theaters, the general public sits primarily in stadium-style seats." Thus, the government contends, Section 4.33.3 requires that wheelchair spaces be afforded in stadium-style seats.

The government contends that to provide lines of sight comparable to those provided to the general public, Cinemark must afford wheelchair patrons seating that provides "viewing angles, distance to the screen, obstruction of view

and distortion of images" comparable to that offered to "most members of the general public." (Gov. Mem. at 26.) The government contends that the location of the wheelchair seating in Cinemark's theaters is among the worst in the house and offers lines of sight inferior to those provided most members of the general public who sit in the stadium-style seats.

The government asks the Court to "grant partial summary judgment rulings" as follows:

> (1) That Section 302 of the ADA and its implementing regulations, 28 C.F.R. §§ 36.201, 36.202, and 36.203 prohibit movie theater owners and operators from excluding people who use wheelchairs from seating in the stadium-style sections of a theater auditorium while offering such seating to the general public;
>
> (2) That Cinemark has violated Section 303 of the ADA and 28 C.F.R. §§ 36.201, 36.202, and 36.203 in its auditoriums that seat fewer than 300 persons and that individually include both stadium-style and non-stadium style seating, by allowing members of the-general public access to stadium-style seats while denying persons who use wheelchairs access to the stadium-style section of the theater;
>
> (3) That Section 303(a) of the ADA, 42 U.S.C. § 12183(a) and its implementing regulation, 28 C.F.R. Subpart D and Standard 4.33.3 which

require that wheelchair seating be an integral part of any fixed seating plan, mandate that in a stadium-style theater, the required number of wheelchair spaces must be provided in the stadium-style section of the theater;

(4) that Cinemark has violated these provisions in constructing and altering stadium-style theaters by placing wheelchair seating areas in the non-stadium-style portion of the theaters;,

(5) That Section 303(a) of the ADA, 42 U.S.C. § 12183(a) and 28 C.F.R. Subpart D and Standard 4.33.3 mandate newly constructed and altered movie theaters with stadium-style seating to provide wheelchair spaces with lines of sight comparable to those for members of the general public; and

(6) That Cinemark has violated these provisions in movie theaters with stadium-style seating by failing to provide lines of sight for wheelchair users that are within the range of viewing angles provided to most members of the general public.

(Gov. Mem. at 34-35.)

Cinemark opposes the government's motion and moves for summary judgment in its favor on all of the ADA claims alleged against it. Cinemark contends its theaters comply with the ADA because they satisfy the requirements of the ADAAG, which sets forth the standards newly constructed buildings must follow in order to comply with the ADA.

Appendix D

Cinemark relies on the Fifth Circuit's decision in *Lara, et al. v. Cinemark USA, Inc.*, 207 F.3d 783, *cert. denied*, 531 U.S. 944 (2000).

In *Lara*, a group of individuals with disabilities and two disability rights activist groups filed suit against Cinemark alleging that the wheelchair placements in Cinemark stadium-style movie theaters in El Paso, Texas violated state and federal accessibility laws. In *Lara*, as here, Cinemark located wheelchair accessible seating on the sloped floor near the front of the theaters and in front of the stadium-style seats. Plaintiffs alleged, as the government alleges here, that Cinemark's wheelchair seating was uncomfortable, too close to the screen and was inferior in terms of viewing angle to the screen to the view offered in the stadium-style seats.

The Fifth Circuit held that Cinemark's theaters complied with Section's 4.33.3's requirement that wheelchair patrons be provided "lines of sight comparable to those for members of the general public." The Court held that Section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons. Instead, the Court held, the "lines of sight comparable" phrase in Section 4.33.3 required only that wheelchair-bound patrons be provided unobstructed views of the screen. *Lara*, 207 F.3d at 789.

The *Lara* Court reasoned that in contrast to questions of viewer obstruction which the Access Board and the DOJ explicitly considered before issuing Section 4.33.3, questions regarding "viewing angle" did not arise until well after the DOJ issued Section 4.33.3. *Id.* at 788. The Court also found

that although the phrase "lines of sight" lacked a clear meaning in the ADA context at the time the DOJ adopted Section 4.33.3, in other contexts the phrase meant "unobstructed view." *Id.* Finally, the Court found significant language by the Access Board in a Notice of Proposed Rulemaking published in the Federal Register on November 16, 1999. *Id.*, *citing* 64 Fed. Reg. 62248, at 62278 (Nov. 16, 1999). The Board stated in the Notice that it was aware the DOJ had taken the position in attempting to settle particular cases involving stadium-style seating that wheelchair seating must be located in the stadium-style sections and provide viewing angles provided by 50 percent of the seats in the auditorium and a view of the screen in terms of lack of obstruction in the top 50 percent of all seats sold in the theater. The Board stated, however, that it was "*considering* whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters." *Id.* (emphasis added.) The Court found this language to indicate recognition by the Access Board that modification to Section 4.33.3 was necessary in order to codify the DOJ's "litigating position." The Court held that because the evidence did not show that the Access Board intended current Section 4.33.3 to impose a viewing angle requirement, the phrase "lines of sight" in Section 4.33.3 did not require anything more than that theaters provide wheelchair-bound patrons unobstructed views of the screen. *Lara*, 207 F.3d 789.

Cinemark contends *Lara* is highly persuasive authority here "since all of the DOJ's claims are . . . predicated on the same 'litigating position' rejected by the Fifth Circuit in *Lara* and since all of Cinemark's stadium-style movie theaters meet

the accessibility criteria held by the Fifth Circuit to be legal," *i.e.*, that wheelchair be patrons be afforded seating with unobstructed views of the screen amidst seating for the general public. (Cinemark Mem. at 11.)

Cinemark also maintains that it entitled to summary judgment on the basis of estoppel, and it asserts that the DOJ's "attempt to impose new construction requirements for wheelchair-accessible seating through litigation violates the Administrative Procedure Act." (Cinemark Mem. at 17.) Cinemark asserts that since it was granted accessibility approvals for its stadium-style movie theaters in Texas under Texas's accessibility guidelines, and the DOJ certified Texas's guidelines as "meeting or exceeding the standards of the ADAAG," the DOJ should be estopped from asserting a litigating position here that "summarily invalidates state and local accessibility approvals already granted under [the DOJ's] own state code certification program after Cinemark has relied on them." (Cinemark Mem. at 13.) Cinemark contends that the doctrine of collateral estoppel applies to bar the government's claims because the DOJ was actively involved in the *Lara* lawsuit in which the Court rejected the government's litigating position. At a minimum, Cinemark contends, *Lara* is binding as to all Cinemark theaters located within the Fifth Circuit.

This Court finds the reasoning of the *Lara* Court persuasive. The government has not persuaded the Court that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle. Like the *Lara* Court, this Court finds the comments of the Access Board in its November 16, 1999 Notice of Proposed Rulemaking particularly significant.

Appendix D

In its 1999 Notice of Proposed Rulemaking, the Access Board acknowledged its awareness of the DOJ's "litigating position" with respect to stadium-style theaters, but stated that it was *considering* whether Section 4.33.3 should be modified to reflect the DOJ's position. The Access Board stated:

> Stadium-style motion picture theaters comprise a type of assembly area that has become increasingly popular in the last several years. They provide the general public with sight lines to the screen that generally are superior to those offered in traditional-style motion picture theaters. Stadium-style theaters provide improved viewing in one key way: they furnish an **unobstructed view** of the entire screen through the utilization of relatively high risers that furnish **unobstructed viewing** over the heads of the persons seated in the rows ahead . . .
>
> The Board is aware of the [DOJ]'s enforcement of [Section] 4.33.3 with respect to assembly areas with stadium-style seating. DOJ has stated that 4.33.3 requires that wheelchair areas be an integral part of any fixed seating plan, and be provided so that people with disabilities have lines of sight and a choice of admission prices comparable to those for other members of the general public. As applied to stadium-style theaters . . . DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor of other area within

> the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium; and (3) provide a view of the screen, in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. **The Board is considering whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters.**

64 Fed. Reg. at 62278 (emphasis added.) Significantly, the Board explained the superior nature of stadium seating in terms of unobstructed views, and acknowledged that changes to current law were necessary to codify the DOJ's litigating position.

The Access Board also stated in its Notice that it was "considering whether to provide additional guidance on determining whether lines of sight are comparable in assembly areas." The Board further stated:

> When the dispersion of wheelchair spaces is not required (*i.e.*, in small assembly areas) the placement of the wheelchair spaces in relation to other seating acquires greater significance because wheelchair users are not offered a choice of viewing angles. Therefore . . . **it may be necessary** for wheelchair spaces not only to

> provide lines of sight comparable to those provided to spectators seated in the same area, but also to provide lines of sight that are comparable to those provided for most of the other patrons in the assembly area. Consequently, the Board is **considering** specifying that wheelchair spaces in assembly areas, where dispersion is not required, must be located so that the lines of sight provided are comparable to (*i.e.*, equal to or better than) the lines of sight provided to the "majority" of the patrons in the assembly area.

Id.

This Court finds the comments by the Access Board in its recent Notice evidence that the DOJ's position with respect to Cinemark's stadium style theaters is not embodied in current Section 4.33.3.

The government contends that the Court should defer to its interpretation of its regulation. However, "[a] court should not defer to an agency's interpretation of its own regulation if an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso v. Blockbuster-Sony Music Ent. Centre*, 193 F.3d 730 (3rd Cir. 1999), *quoting Thomas Jefferson University v. Shalala*, 512 U.S. 404, 512 (1994). In that the Court does not find the "lines of sight comparable" language contained in current Section 4.33.3 to encompass particular viewing angles or distance from the screen as the DOJ asserts, the Court does not agree with the government that Cinemark's theaters violate the lines of sight comparable

phrase in Section 303(a) of the ADA and 28 C.F.R. Subpart D and Standard 4.33.3 by failing to place wheelchair accessible seating in the stadium-style portion of its theaters.

The Court also does not find that Cinemark's placement of the wheelchair seating in its theaters violates the "integral part" requirement of Section 4.33.3. The Court does not find that the legislative record shows that the integral part requirement pertains to particular viewing angles. In its Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, the DOJ explained integration of wheelchairs not in terms of having viewing angles better than 50% of the seats in an assembly area, but in terms of wheelchair patrons being able to sit near family and friends. *See* 28 C.F.R. Part 36, App. B § 36.308 ("Individuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends. The provisions of § 36.308 are intended to promote integration and equality in seating.") Cinemark's theaters do not place wheelchair patrons in the back of the assembly area apart from family and friends.

For the reasons stated above and those stated by the Fifth Circuit in *Lara*, the Court does not find that Cinemark's theaters violate Section 303 of the ADA and its implementing regulations.

The Court also does not find that Cinemark's theaters violate Section 302 of the ADA. The Court agrees with Cinemark that it would be illogical and unfair to find a violation of Section 302 of the ADA based on the design and

construction of a public accommodation where the accommodation has been shown to comply with Section 303 of the ADA and all of the technical requirements of the ADAAG (which was promulgated for the very purpose of assisting covered entities in understanding their responsibilities with respect to the design and construction of new facilities). The government maintains that compliance with Section 303 is not always sufficient to comply with all of the mandates of Title III. It maintains, for example; that it would be absurd to find that an owner or operator complied with all aspects of the ADA because it designed and constructed its facility in full compliance with all relevant technical guidelines where the owner or operator denies persons who use wheelchairs access to the facility. (Gov. Rep. in Supp. at 6.) This example is not relevant here. Here, the government's Section 302 claim is based on the design and construction of Cinemark's stadium-style theaters, not on allegations its has denied wheelchair patrons access to its facilities. The ADAAG sets forth the standards for the design and construction of new facilities in order to satisfy the ADA. *See* 42 U.S.C. § 12183(1); 42 U.S.C. § 12204. Thus, compliance with Section 303 and the ADAAG demonstrates compliance with the Section 302 in the context of the allegations here. The government has cited no authority supporting the position that a violation of Section 302 may exist based on the design and construction of a facility where the facility complies with Section 303 and the ADAAG.

As the Court does not find that the government has shown that Cinemark's theaters violate either Sections 302 and 303 of the ADA and their implementing regulations as a matter of law, the government's motion for partial summary judgment is denied.

This leaves Cinemark's motion for summary judgment. Cinemark contends summary judgment in its favor is appropriate with respect to all of its stadium-style multiplexes across the nation because the DOJ's claims in this lawsuit are predicated on the same "litigating position" rejected by the Fifth Circuit in *Lara*, and "all of Cinemark's movie theaters meet the accessibility criteria held by the Fifth Circuit to be legal," *i.e.*, that wheelchair accessible seating provides nonobstructed views of the screen in seating amidst seating for the general public. (Cinemark Mot. in Supp. at 11.) Cinemark relies on the affidavit testimony of its Vice President of Design and Construction, Don Harton. (Def. App. Ex. A.) In paragraph 7 of his affidavit, Mr. Harton states:

> The wheelchair-accessible seating locations at all of Cinemark's stadium-style movie theaters provides wheelchair-using patrons with unobstructed views of the screen. The wheelchair seating is located amidst general public seating in all but nine of Cinemark's multiplexes (covering a total of 52 auditoria). The wheelchair seating in these 52 auditoria is located on the first row of the movie theater and adjoins general public seating. A summary review of "as-built" designs produced to the DOJ shows this to be true, and I also know this to be true due to my position with Cinemark and personal visits to many of these movie theaters.

(Harton Aff. ¶ 7.)

The government does not point to evidence (or indeed even argue) in its opposition brief that Mr. Harton's statement

is incorrect or that some or all of Cinemark's theaters fail to provide wheelchair patrons unobstructed views of the screen.[4] The government moved, however, in a separate motion to strike paragraph 7 of Harton's affidavit and other evidence submitted by Cinemark. (Docket no. 75.) The government contends that paragraph 7 of Mr. Harton's affidavit should be stricken because the phrase "unobstructed views of the screen" as used by the Fifth Circuit in Lara has a specialized legal meaning requiring expert testimony, and Mr. Harton is not qualified as an expert in accessibility issues and the application of the ADA. The government contends that Mr. Harton's opinions regarding the phrase unobstructed views are "legal conclusions and go beyond Mr. Harton's capacity to testify as a lay witness." (Br. in Supp. of Mot. to Strike at 6.)[5]

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4. The government's position in its opposition brief, as it was in support of its own motion for summary judgment, is that the *Lara* decision is incorrect, and the integration and comparable lines of sight phrases in Section 4.33.3 require Cinemark to provide wheelchair accessible seating in the stadium-style sections of its theaters and viewing angles equivalent or better than 50% of the seats. (Gov. Opp. at 5, 7-8.) As stated above, this Court does not agree with the government's interpretation of Section 4.33.3.

5. The government further states that if the Court accepted the Fifth Circuit's interpretation of the comparable lines of sight requirement in Section 4.33.3 (*i.e.*, that wheelchair bound patrons must be afforded "unobstructed views of the screen"), the parties would still need to litigate precisely what it means to have an "unobstructed view of the screen," and the Court ultimately would decide the legal definition of the phrase. (Govt. Rep. to Mot. to Strike at 4.)

Appendix D

The government cites no authority supporting the proposition that the phrase "unobstructed views of the screen" has some sort of specialized legal meaning requiring expert testimony. This Court finds that it does not. The Court finds Mr. Harton's opinions admissible under Fed. R. Evid. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of . . . a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.") Fed. R. Evid. 701. Mr. Harton is Cinemark's Vice President of Design and Construction and states, based on the as-built reviews of the theaters provided to the DOJ and his personal visits to many of Cinemark's theaters, that all of Cinemark's theaters afford wheelchair patrons unobstructed views of the screen. This is appropriate summary judgment evidence.

If the government believes that Mr. Harton's observations are incorrect or that some or all of Cinemark's theaters fail to afford wheelchair patrons "unobstructed views of the screen," then it is the government's obligation to come forward on summary judgment with evidence sufficient to create an issue of fact on that point. The government, however, does not point to any evidence indicating (indeed, the government does not argue) that some or all of Cinemark's stadium-style theaters provide wheelchair seating with obstructed views of the screen under any interpretation of the phrase. Thus, the government has not met its burden on summary judgment of demonstrating a genuine issue for trial on the question of obstruction.

Appendix D

In that the government has not come forward with evidence sufficient to show that the wheelchair seating in any of Cinemark's theaters suffers from an obstructed view, this Court finds summary judgment in Cinemark's favor appropriate under *Lara* as to all of Cinemark's theaters where the wheelchair seating is located amidst seating for the general public. These theaters meet the criteria held by the Fifth Circuit in *Lara* to satisfy Title III of the ADA and include all of Cinemark's theaters except the nine multiplexes, or 52 auditoria, which Mr. Harton states position wheelchair seating in the first row of the movie theater *adjoining* general public seating. (*See* Harton Aff. ¶ 7.) With respect to these nine multiplexes, Cinemark acknowledges that the wheelchair seating is not located "amidst" general public seating as found in *Lara*. And Cinemark states:

> The fact that wheelchair seating in these [52] auditoria adjoins general public seating but is not located amidst public seating implicates dicta in *Lara* that admittedly creates some ambiguity as to whether deferring to *Lara* would be dispositive as to these auditoria.

(Cinemark Mem. at 11, n. 3.) Cinemark asserts, however, that the "amidst-adjoins distinction is immaterial" and summary judgment is appropriate with respect to these nine multiplexes because the Fifth Circuit held in *Lara* that the phrase "lines of sight comparable" in Section 4.33.3 did not require anything more than that theaters provide wheelchair-bound patrons unobstructed views of the screen. *Id.*

Appendix D

While the Court recognizes that the government asserts violations of the comparable lines of sight requirement *and* the "integral part of any fixed seating plan" requirement of Section 4.33.3 in this case (whereas the plaintiffs in *Lara* apparently alleged only a violation of the lines of sight requirement), the Court does not fired the "amidst-adjoins" distinction material. The government does not address the distinction in its opposition brief, and does not argue or explain how the distinction is relevant to any of the claims its alleges here. Accordingly, the Court finds summary judgment in Cinemark's favor appropriate as to all of its stadium-style theaters, including its theaters where the wheelchair seating is located in the first row of the theater adjoining general public seating.

Conclusion

For the reasons stated above, Plaintiffs' motion for partial summary judgment (docket no. 78) is DENIED. Defendant's Second Motion for Summary Judgment (docket no. 70) is GRANTED.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: November 19, 2001

APPENDIX E — EXCERPTS FROM BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN *LARA v. CINEMARK USA, INC.*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

CIVIL ACTION NO.
EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, and MYRA MURILLO,

Plaintiffs,

v.

CINEMARK USA, INC.

Defendant.

BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES

* * *

Appendix E

II. STATEMENT OF FACTS

* * *

4. The Society of Motion Picture and Television Engineers ("SMPTE") has issued engineering guidelines for theater design, "SMPTE Engineering Guideline Design of Effective Cine Theaters, EG 18-1994" ("SMPTE Guideline") (attached hereto as Exhibit 3). Among other things, the SMPTE Guideline describes "line of sight" as the measurements, expressed in degrees of angles, of the viewer's horizontal and vertical field of vision to the viewing screen. The verticle viewing angle is the angle formed by the intersection of a line horizontal with eye level (a straight-ahead view) and a line from eye level to the top of the viewing screen.

* * *

5. The SMPTE guideline, based on anthropometric data and numerous studies, establishes that physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds +35 degrees, while the vertical range of "easy head movement" is +30 degrees. Exhibit 3 and 1-5. Physical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction. Exhibit 3 at 5.

* * *

7. . . . Consistent with this practical definition, the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of

the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public.[3] In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight." *See* Exhibit 3 at 1-5.

* * * *

3. *See* 28 C.F.R. Part 36, §§ 36.202, 36.203, 36.302 (As a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons); *see also* discussion of § 302 *supra*, at 6.

APPENDIX F — EXCERPTS FROM MEMORANDUM OPINION AND ORDER REGARDING APA COUNTERCLAIM IN *UNITED STATES OF AMERICA v. CINEMARK USA, INC.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1.99 CV 0705

JUDGE DONALD C. NUGENT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff United States of America's Motion to Dismiss Defendant Cinemark's Counterclaim (Doc. #20). For the reasons stated below, Plaintiff's Motion to Dismiss Defendant's Counterclaim is GRANTED.

* * *

Appendix F

Plaintiff argues that its *amicus* brief and subsequent letters do not constitute final agency action. Defendant responds that the DOJ's enforcement actions, correspondence to Defendant and others that they comply with the ADA, and several *amicus* briefs constitute final agency action. Because they do not meet the requirements of finality Plaintiff's filing of complaints in their enforcement actions; correspondence discussing settlement or alleged violations of the ADA; and, *amicus* briefs are not "final" agency actions.[5]

* * * *

Supreme Court, U.S.
FILED
DEC 1 _ 2003
OFFICE OF THE CLERK

No. 03-641

In The

Supreme Court of the United States

REGAL CINEMAS, INC. and
EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH,
and KATHY BRADDY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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25 11

QUESTIONS PRESENTED

1. Whether wheelchair users who patronize stadium-style movie theaters receive "lines of sight comparable to those for members of the general public" as required by the ADA Standards for Accessible Design when they are required to sit in the first few rows of the theater, in locations with objectively uncomfortable viewing angles, while nondisabled patrons can choose from a range of seating locations with comfortable viewing angles.

2. Whether the court of appeals erred in applying the principles of administrative deference articulated in *Auer v. Robbins*, 519 U.S. 452 (1997), by deferring to an agency interpretation of the "lines of sight comparable" provision that was evident from the provision's plain text.

3. Whether the court of appeals' decision constitutes impermissible retroactive lawmaking by reading the "lines of sight comparable" provision in accord with its plain text.

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STATUTES INVOLVED

Pertinent provisions of 42 U.S.C. §12182 of Title III of the Americans with Disabilities Act are reproduced in Respondents' Appendix.

STATEMENT

A. The Statutory Scheme

This case involves movie theater owners' obligation under the Americans with Disabilities Act (ADA) to provide wheelchair users with seating locations that are equivalent to those offered to nondisabled patrons. Title III of the ADA prohibits places of public accommodation, including movie theaters, 42 U.S.C. §12181(7)(C), from discriminating "on the basis of disability in the full and equal enjoyment of [their] goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. §12182(a). The statute gives content to that general command with a series of provisions that define the concept of "discrimination" used in Section 12182(a). One of those provisions defines discrimination to include providing individuals with disabilities "with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." 42 U.S.C. §12182(b)(1)(a)(ii). Another, especially relevant here, defines discrimination to include the "failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. §12183(a)(1). These provisions may be enforced by aggrieved private parties in suits for injunctive, but not

monetary, relief. See 42 U.S.C. §12188(a) (incorporating remedial provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(a)).

The statute required the Attorney General to issue regulations by July 26, 1991, "to carry out" Title III's substantive provisions. 42 U.S.C. §12186(b). It also required a separate agency, the Architectural and Transportation Barriers Compliance Board (commonly known as the Access Board) to issue "minimum guidelines" by April 26, 1991, that would "ensure" that facilities "are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. §12204(a), (b). The statute directed that the Attorney General's regulations "be consistent with" the Access Board's minimum guidelines. 42 U.S.C. §12186(c). Pursuant to those grants of regulatory authority, the Access Board issued minimum accessibility guidelines for facilities, which the Attorney General then adopted as the ADA Standards for Accessible Design. See 28 C.F.R. Pt. 36, App. A. The Attorney General's regulations implementing ADA Title III specifically require all newly constructed facilities to "comply with th[os]e standards for accessible design," which are commonly referred to as the ADAAG (ADA Accessibility Guidelines). 28 C.F.R. §36.406(a).

One of the provisions in the ADAAG, Section 4.33.3, addresses the placement of wheelchair locations in assembly areas such as movie theaters. See 28 C.F.R. Pt. 36, App. A §4.33.3; see also *id.* §3.5 (defining "assembly area"). Section 4.33.3 provides, in relevant part, that "[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines

of sight comparable to those for members of the general public." *Id.* §4.33.3.

B. The Facts

This case involves six multi-screen theater complexes owned and operated by Petitioners in the Portland, Oregon, area. Each complex was built after 1993 and contains 9 to 16 separate movie theaters. The theaters utilize a "stadium-style" design, "which places most of the theater seats on stepped risers rather than on a sloped floor." Pet. App. 3a-4a. As the court of appeals explained, "[i]n most cases, the first few rows at the front of the theater are set on a sloped floor; there is an aisle at the entry level of the theater separating the sloped portion of the seating from the riser section, and the stadium seats (approximately 6-13 rows) then rise behind the aisle, with each row raised 15-18" above the one in front of it." Pet. App. 4a.

As Petitioners note (Pet. 2), the stadium-riser design is very popular with movie theater patrons. But Petitioners have denied wheelchair users access to the stadium-riser seats. In five of the six complexes at issue here, Petitioners have placed all wheelchair locations in the first few rows, in the front sloped section of the theater, instead of in the stadium riser seating. Pet. App. 4a. Over half of the 278 wheelchair seats in these complexes are in the very front row, some as close as 11 feet from the screen, making them essentially the worst seats in the house. C.A.E.R. 41, 43-58.[1] At Petitioners' theaters, "the vertical

[1] Further, unlike the view from the stepped seating in the riser section, the view from the sloped section is partially obstructed. The

(Continued on following page)

lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating – a difference [Respondents'] experts termed a 'tremendous disparity.'" Pet. App. 4a-5a. Nondisabled patrons "find seats that possess the only viewing angles available to wheelchair access users among the least preferable to sit in." C.A.E.R. 108. And wheelchair users "cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater." Pet. App. 5a.

An expert witness explained that such high positive viewing angles force wheelchair users "to tilt their heads upwards unsupported to view the movie screen," a posture that "will lead to the rapid onset of pain and discomfort." C.A.E.R. 112. As the court of appeals explained, the Society of Motion Picture and Television Engineers (SMPTE) has "concluded that, for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees." Pet. App. 5a. The three Respondents, wheelchair users who patronized petitioners' theaters, all experienced significant discomfort when forced to sit in the first few rows: Kathy Stewmon "had to keep moving [her] head back and forth to look at the whole movie screen" and became "dizzy trying to focus," Pet. App. 5a-6a (quoting Stewmon); Tina Smith experienced a headache and nausea, Pet. App. 6a; and

---

seats in the sloped section have only a 3 inch vertical rise over the row in front, C.A.E.R. 60, as compared with as much as 18 inches between stadium rows. Pet. App. 4a.

Kathleen Braddy testified that "she would have had to bend her neck back to the point where her vision would have been blurry" to sit in the wheelchair-accessible rows, Pet. App. 6a.

C. Prior Proceedings

Respondents brought this action in the United States District Court for the District of Oregon. As relevant here, Respondents contended that Petitioners' wheelchair seating arrangements violated ADAAG §4.33.3's requirement that wheelchair users enjoy "comparable" lines of sight to those offered nondisabled patrons. Respondents sought injunctive relief on that ADA claim.

The district court granted summary judgment to Petitioners, Pet. App. 36a, but the court of appeals reversed and remanded, *id.* at 3a. Deferring to the Department of Justice's interpretation of its regulation, Pet. App. 12a, the court of appeals concluded that Section 4.33.3's requirement of "comparable" lines of sight mandates "a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats." Pet. App. 17a. The court relied on dictionary definitions of the terms "comparable" and "lines of sight." Pet. App. 13a. It also relied on guidelines from the SMPTE and the National Association of Theatre Owners (NATO), both of which indicated the general industry practice of measuring lines of sight based on the angle above or below the horizontal on which those lines lie. Pet. App. 13a-14a. The court specifically rejected Petitioners' argument that the "comparable" lines of sight requirement had no application here because Section 4.33.3's drafters did not anticipate that stadium-style movie theaters would be

developed some years after the promulgation of the regulation: "[T]he issue is whether a broadly-drafted regulation – with a broad purpose – may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated – a question that the Supreme Court has answered in the affirmative." Pet. App. 16a (citing *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

Accordingly, the court of appeals reversed the district court's grant of summary judgment to Petitioners and instead directed entry of summary judgment to Respondents. Pet. App. 17a. It remanded, however, without prescribing the remedy the district court should issue for Petitioners' violation of Section 4.33.3.

REASONS FOR DENYING THE WRIT

The ADA Accessibility Guidelines (ADAAG) require Petitioners to provide wheelchair locations with "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A §4.33.3. The court of appeals held that Petitioners violated the requirement to provide "comparable" lines of sight because "[i]n the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose." Pet. App. 17a. That holding, which represents the most obvious reading of the relevant regulation, is also plainly required by the statutory text. As the court of appeals concluded, it is "simply

inconceivable that [Petitioners'] arrangement could constitute 'full and equal enjoyment' of movie theater services by disabled patrons." *Id.* (quoting 42 U.S.C. §12182(a) (providing that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation")).

There are no "compelling reasons," S.Ct. R. 10, for this Court to review the court of appeals' decision at this time. Although the Fifth Circuit in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), reached a different conclusion, the court of appeals' decision here is in accord with the holding of the only other circuit to have addressed the question since *Lara*. See *United States v. Cinemark USA, Inc.*, 2003 WL 22508500 (6th Cir., Nov. 6, 2003). As Petitioners note, a number of "cases presenting the same issue are now pending" throughout the country, Pet. 12, and the Access Board might address this issue in the current round of revisions to the ADAAG. Especially given the essentially interlocutory nature of the decision below, this is precisely the sort of question on which further percolation in the lower courts and the administrative process is appropriate.

Petitioners also urge that this Court grant certiorari "to explain the limits of *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference," Pet. 25, and to hold that the court of appeals engaged in unconstitutional retroactive lawmaking, *id.* at 26-27. Petitioners can identify no split in the circuits over these questions. To the contrary, they seek nothing more than garden-variety error correction of the lower court's purported misapplication of settled administrative law principles. Accordingly, this Court should deny the petition for writ of certiorari.

I. Review Of The Court Of Appeals' Interpretation Of ADAAG §4.33.3 Is Premature

The court of appeals adopted the most natural reading of the ADAAG requirement that wheelchair locations have "lines of sight comparable to those for the general public." 28 C.F.R. Pt. 36, App. A §4.33.3. As that court explained, wheelchair users in Petitioners' theaters had "no choice but to sit in the first few rows of the theater," Pet. App. 4a, with no access whatsoever to the riser seating that is the *raison d'etre* for the stadium-style design. See Pet. 2. And "the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating." Pet. App. 4a-5a. This disparity is especially significant given that "for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees," *id.* at 5a, and that wheelchair users, unlike nondisabled patrons, "cannot slump in their seats and recline their bodies in order to adjust for the uncomfortable viewing angle," *ibid.*

In these circumstances, the court of appeals readily deferred to the Department of Justice's interpretation of the "lines of sight comparable" language of the regulations as including viewing angles, Pet. App. 13a-15a, and held that Petitioners' theaters did not comply with that requirement, see *id.* at 17a. But the court's decision was quite evidently driven by the plain text of both the regulations and the ADA itself. See *id.* at 13a-14a (relying on dictionary definitions of "line of sight," as well as publications from the SMPTE and the NATO that treat the term as encompassing viewing angles); *id.* at 16a (stating that "the fact that DOJ may not have been contemplating

viewing-angle issues in the context of stadium-style seating at the time when §4.33.3 was promulgated is not dispositive" given the "broadly-drafted" wording of the regulation); *id.* at 17a ("We find it simply inconceivable that this arrangement could constitute 'full and equal enjoyment' of movie theater services by disabled patrons."). More recently, the Sixth Circuit, adopting the same interpretation of the "lines of sight comparable" language as did the appellate court here, expressly rested on "the plain meaning of ADAAG §4.33.3." *United States v. Cinemark*, *supra*, at *4.

The only other federal appellate case to address the application of Section 4.33.3 to stadium-style movie theater seating reached a contrary conclusion. See *Lara*, *supra*. But subsequent cases have pointed out a number of serious errors in the *Lara* court's reasoning. For one thing, that court read "the phrase 'lines of sight comparable'" as requiring only "that theaters provide wheelchair-bound patrons with unobstructed views of the screen." *Lara*, 207 F.3d at 789. As the Sixth Circuit later explained, *Lara* thus "effectively ignored the phrase 'comparable to those for members of the general public,' and in so doing failed to take sufficiently into account the purpose of Title III of the ADA." *United States v. Cinemark*, *supra*, at *6.[2] And as the court of appeals explained here, the *Lara* court also ignored significant evidence of industry practice – publications from professional and trade industry organizations

[2] Moreover, the Fifth Circuit's construction of "lines of sight" as meaning only "unobstructed" is inconsistent with the ADAAG as a whole. The drafters of the regulation knew how to impose a prohibition on obstruction when they meant "unobscured." See, *e.g.*, 28 C.F.R. Pt. 36, App. A §4.6.3 ("Parking signs shall be located so they cannot be obscured by a vehicle parked in the space.").

that recognize that any analysis of "lines of sight" must take account of the angle on which those lines lie. See Pet. App. 14a (referring to SMPTE publication stating that "the normal line of sight is 12° to 15° below the horizontal," and NATO publication stating that "lines of sight are measured in degrees").

The *Lara* court relied on the fact that the Department of Justice and the Access Board never explicitly discussed issues of viewing angle at the time they issued the ADAAG. See *Lara*, 207 F.3d at 788-89. The court also relied on the Access Board's request, eight years *after* the promulgation of the ADAAG, for public comment regarding "whether to include specific requirements" governing stadium-style movie theaters in its amended accessibility guidelines. See 64 Fed. Reg. 62248, 62278 (Nov. 16, 1999). The *Lara* court read this request as implicitly recognizing that the existing ADAAG did not require wheelchair users' lines of sight to be comparable in the viewing angles they afford to the lines of sight enjoyed by nondisabled patrons. See *Lara*, 207 F.3d at 788.

But as the court of appeals noted here, it is irrelevant whether the agencies that promulgated Section 4.33.3 actually contemplated in 1991 the way in which the plain text of the "lines of sight comparable" language would apply to the stadium-style movie theaters that began sprouting up four years later. Pet. App. 16a (citing *Yeskey*, 524 U.S. at 212 ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (internal quotation marks omitted)). And as the Sixth Circuit observed, see *United States v. Cinemark*, *supra*, at *6-*7, the subsequent administrative history relied on by the *Lara* court is similarly unpersuasive. Not only are subsequent agency statements a "hazardous basis" on

which to determine the regulation's plain meaning, *cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.") (internal quotation marks omitted), but the 1999 Access Board statement on which the *Lara* court relied does not in fact reject the plain-language interpretation of "comparable" employed by the court of appeals here. As the Sixth Circuit noted, *United States v. Cinemark*, *supra*, at *6, the Access Board expressly stated that wheelchair users confined to the first few rows of stadium-style theaters "are afforded inferior lines of sight to the screen." 64 Fed. Reg. 62278, reprinted at App. 2, *infra*. That the agency was considering adding more "specific" language to address viewing-angle issues in such theaters, *id.*, suggests only that the Access Board thought a more precisely targeted response to this particular problem might be appropriate. It does not at all detract from the fact that viewing angle issues are already addressed by the general comparability requirement in Section 4.33.3 as currently written. See *United States v. Cinemark*, *supra*, at *6.[3]

[3] The dissenting judge below suggested that because many of the ADAAG requirements impose very specific, detailed obligations on builders (*e.g.*, "the regulations delimit knee space to the millimeter"), the courts should not give independent effect to the generally phrased requirement of "comparable" lines of sight in circumstances the regulation's drafters did not "expressly anticipate[ ]." Pet. App. 26a (internal quotation marks omitted). That suggestion has it backwards. That the regulations incorporate broadly phrased standards like the "lines of sight comparable" requirement demonstrates that the drafters recognized they could not expressly anticipate and create precisely framed rules governing all of the possible circumstances to which the regulations would apply. And indeed, the "lines of sight comparable" provision is not the only provision of the ADAAG that incorporates such a broad general standard. See, *e.g.*, 28 C.F.R. Pt. 36, App. A §4.6.3

(Continued on following page)

Each of the two courts of appeals to have addressed the issue since *Lara* have recognized the flaws in the Fifth Circuit's reasoning in that case, and every district court decision to have followed *Lara* – including the district court decision in this case – has been overturned on appeal. See *Meineker v. Hoyts Cinemas Corp.*, 216 F.Supp.2d 14 (N.D.N.Y. 2002), vacated, 2003 WL 21510423 (2d Cir., July 1, 2003); *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705 (N.D. Ohio, Nov. 19, 2001), rev'd, 2003 WL 22508500 (6th Cir., Nov. 6, 2003); see also *United States v. Hoyts Cinemas Corp.*, 256 F.Supp.2d 73 (D. Mass. 2003) (ruling in accord with the court of appeals here); *United States v. AMC Entertainment, Inc.*, 232 F.Supp.2d 1092 (C.D. Cal. 2002) (same). Given the impressive number of stadium-style theater cases currently winding their way through the lower courts – a fact emphasized by Petitioners, see Pet. 12-13 & n.10 – the conflict in the circuits may well resolve itself. Even if it does not, this Court's ultimate decision will be aided by further airing of the issues in the circuits.[4]

("parking signs shall be located so they cannot be obscured by a vehicle parked in the space"); §4.30.3 ("Characters and numbers on signs shall be sized according to the viewing distance from which they are read"); §4.8.2 ("The least possible slope shall be used for any ramp.").

[4] Petitioners urge (Pet. 18) that the existence of differing accessibility standards in different circuits places an undue burden on architects and nationwide enterprises. As the Sixth Circuit recently explained, Petitioners' concerns are overblown: "any chain of stores that extends across state lines is subject to the different building codes of the various states in which it chooses to build a store (and probably to a variety of different local ordinances at each location as well)." *United States v. Cinemark, supra*, at *8 n.7. While inter-circuit uniformity in the interpretation of federal law is to be desired, the lack of uniformity created by the Fifth Circuit's *Lara* decision imposes no greater burden

(Continued on following page)

The argument that this Court should defer consideration of these issues is particularly strong here given the essentially interlocutory nature of the court of appeals' decision. That court directed the district court to enter summary judgment for Respondents on the issue of liability, because the lines of sight Petitioners offered to wheelchair users were not, in any meaningful sense of the term, "comparable" to those offered nondisabled patrons. Pet. App. 17a. But the court of appeals had no need to delineate the precise scope of the obligations Section 4.33.3 places on Petitioners, because it left the design of the remedy to the district court in the first instance. Petitioners' challenges to the supposed "ambiguity" of the court of appeals' decision, Pet. 13-14, would be best addressed on review of a concrete remedial order. Such an order, unlike the basic finding of liability, would be required much more specifically to describe the extent of the obligations imposed on Petitioners. See *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari) (certiorari inappropriate when court of appeals simply ordered judgment for respondents on liability but remanded on the question of remedy).

And there is yet another reason for this Court to hesitate before inserting itself into the controversy regarding the application of Section 4.33.3 to stadium-style theaters. The Access Board is currently in the midst of

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on architects or interstate enterprises than they face all the time in seeking to comply with diverse local building codes. There is no compelling reason for this Court to short-circuit the full consideration of the stadium-style theater issue in the lower courts.

"completely updat[ing] and revis[ing]" the ADAAG. Access Board, Revision of ADA and ABA Accessibility Guidelines, available at http://www.access-board.gov/ada-aba/status.htm (accessed November 11, 2003). As Petitioners emphasize, the Access Board's Notice of Proposed Rulemaking for these revisions specifically stated that the agency was "considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters." 64 Fed. Reg. 62278. That statement does not, as the Fifth Circuit believed, override the plain meaning of the "lines of sight comparable" language in the current regulation. See pp. 10-11, *supra*. But it does suggest that the Access Board's final rule, which has not yet issued, might obviate any continuing controversy regarding application of the ADAAG to stadium-style theaters.

II. The Generic Question Of The Deference Accorded To An Agency's Interpretation Of Its Regulations Does Not Warrant This Court's Review

Petitioners urge that there is a "significant tension in this Court's judicial deference doctrine." Pet. 19. They contrast two decisions of this Court: (1) *Auer*, 519 U.S. at 461-463, which deferred to the Secretary of Labor's interpretation, published in an *amicus* brief filed in this Court, of a regulation the Secretary had promulgated to implement the Fair Labor Standards Act (FLSA); and (2) *Christensen v. Harris County*, 529 U.S. 576, 586-588 (2000), which declined to defer to a Department of Labor opinion letter's interpretation of the FLSA regulations. Petitioners contend that these cases stand in a "tension" that has led

to "confusion in the lower courts," Pet. 20. Petitioners are incorrect.

Far from standing in tension, *Auer* and *Christensen* together demarcate the proper boundaries of deference to agencies' interpretations of their own regulations. In *Auer*, the Court deferred to the Secretary's interpretation because the relevant regulation "comfortably [bore] the meaning the Secretary assign[ed]," *Auer*, 519 U.S. at 461, and the interpretation "reflect[ed] the agency's fair and considered judgment on the matter in question," *id.* at 462. In *Christensen*, the Court expressly held *Auer* inapplicable because the agency interpretation at issue *conflicted* with the unambiguous text of the relevant regulation. See *Christensen*, 529 U.S. at 588.

In their effort to show "confusion" in the lower courts, Pet. 20, petitioners do not identify any circuit-court cases that purport to reject these principles or find a conflict between *Auer* and *Christensen*. Instead, they point to cases in which, like the *Christensen* Court, lower courts found it inappropriate to defer to particular agencies' interpretations of particular regulations, whether because those interpretations did not "reflect the agency's fair and considered judgment," *Auer*, 519 U.S. at 462, or because they conflicted with the regulation's unambiguous terms, see *Christensen*, 529 U.S. at 588. See Pet. 20-24 (collecting cases). That other courts applying the *Auer* and *Christensen* principles to *other* agencies' interpretations of *other* regulations found deference inappropriate on the facts before them does not at all suggest that the court of appeals applied any different principle when it deferred to the Department of Justice's interpretation of the ADA Accessibility Guidelines here. To the contrary, the court of appeals expressly relied on *Auer* here. Pet. App. 13a n.6. It

is to be expected that lower courts will reach different results when they apply well-settled but general rules of law like this Court's deference doctrine to a diverse array of factual contexts.

There is thus no conflict in the circuits or other reason for this Court to grant certiorari to revisit the generic question of the deference accorded to agencies' interpretations of their own regulations.[5] In the end, Petitioners all but admit that they seek nothing more than to correct the court of appeals' purported "misappl[ication]" of *Auer*. See Pet. 25 (arguing that the court of appeals' holding "allows courts to misapply *Auer*" and that the Department of Justice's interpretation here was significantly different from the Secretary of Labor's interpretation to which this Court deferred in *Auer*). But this Court does not sit to engage in such error correction. See S.Ct. R. 10 (certiorari ordinarily is not granted on the basis of "misapplication of a properly stated rule of law").

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[5] Even if there were, this case would be a singularly inappropriate vehicle for considering the extent of deference accorded to agencies' interpretations of ambiguous regulatory terms. Far from being ambiguous, the regulation at issue here plainly compels the interpretation the Department of Justice has placed on it. Accordingly, the court of appeals' decision was correct even if it was inappropriate to accord deference to the position articulated in the Department's *amicus* brief. See *United States v. Cinemark*, *supra*, at *4 (relying on the "plain meaning" of the regulation to reach the same result the court of appeals reached here).

III. Petitioners' Factbound Contention That The Court Of Appeals' Decision Represents Impermissible Retroactive Lawmaking Does Not Warrant This Court's Review

Petitioners contend (Pet. 26-29) that the court of appeals adopted an interpretation of Section 4.33.3 that was not "reasonably comprehensible" from the text of the regulation. Accordingly, Petitioners argue, that court's decision represents impermissible retroactive legislation that denied them fair warning in violation of the Due Process Clause. This effort to constitutionalize Petitioners' disagreement with the lower court's reading of Section 4.33.3 does not justify a grant of certiorari.

Petitioners identify no conflict in the circuits regarding the fair warning principle. They contend only that the court of appeals' decision incorrectly applied that principle. See Pet. 26-29. Once again, Petitioners seek mere error correction. Moreover, there is simply no error to correct here. As we have explained, see pp. 8-9, *supra*, and the Sixth Circuit squarely held, see *United States v. Cinemark*, *supra*, at *4, Section 4.33.3's text does more than provide fair warning that it is subject to the interpretation placed on it by the court of appeals; the plain text of the regulation compels that interpretation. The regulation requires that Petitioners provide patrons who use wheelchairs with "lines of sight comparable to those for the general public." 28 C.F.R. Pt. 36, App. A §4.33.3. The court of appeals held that Petitioners fail to provide "comparable" lines of sight when they provide nondisabled patrons with "a range of comfortable viewing locations" but relegate wheelchair users to the worst seats in the house – seats that require them to experience discomfort when they must "crane their necks and twist their bodies in

order to see the screen." Pet. App. 17a. That interpretation is consistent with the industry practice of measuring "lines of sight" by the viewing angle they afford. See Pet. App. 14a (quoting SMPTE and NATO publications). Indeed, it is "simply inconceivable" that any other interpretation of the regulation and its underlying statute could be proper. *Id.* at 17a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

42 U.S.C. §12182

§12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities . . .

(ii) Participation in Unequal Benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage or accommodation that is not equal to that afforded to other individuals.

* * *

Access Board Commentary on 28 C.F.R. Pt. 36, App. A §4.33.3, 64 Fed. Reg. 62248, 62278 (November 16, 1999) (Excerpt)

* * * . As stadium style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows in each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen. * * *

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No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

A. Respondents Admit The Existence Of A Circuit Conflict Regarding Interpretation Of An ADAAG Regulation That Impacts How Places Of Assembly Are Constructed.

Stewmon v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003), and *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), present a classic conflict between the nation's two largest circuit courts of appeals. The conflict is significant, irreconcilable, and, for builders everywhere, deplorable. It places basic engineering decisions for all places of assembly governed by the Americans with Disabilities Act in question and destroys any reasonable expectation that those investing millions of dollars in construction projects may rely upon published federal construction standards. Respondents admit the existence of the circuit split, as they must, given the express acknowledgments of conflict contained in both the *Stewmon* majority and dissenting opinions. *See Stewmon*, 339 F.3d at 1133 n.9 (B. Fletcher, J.); *id.* at 1133 (Kleinfeld, J., dissenting).

Respondents' argument that review should be denied because the *Stewmon* decision was "essentially interlocutory" (Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Respondents' Brief") at 7) deserves little comment. The Ninth Circuit reversed the district court's final judgment in favor of Regal and *issued express instructions to grant summary judgment in favor of Respondents. See Stewmon*, 339 F.3d at 1133.[1]

As Regal and the *amici* make clear, this Court's review of *Stewmon* is urgently needed. Under the circumstances here, the Court should not delay review in order to allow the DOJ to "weigh in" on the Petition. The Department has already had ample opportunity to do so. The Department needed no

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1. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), is inapposite because the Fourth Circuit decision from which certiorari was sought made no ultimate determination on the merits and issued no similar instructions to enter judgment. *See United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992) (affording the Commonwealth the opportunity to change its policies on admitting women to VMI, establishing parallel institutions or parallel programs, or other options).

invitation to file its *amicus curiae* brief in the court below, nor did it hesitate to appear for oral argument. In briefing, argument, decision, and dissent, the DOJ's interpretation has consistently been the dominant issue. Furthermore, Regal not only served the Department with its Petition, but also provided the Department with a courtesy electronic copy of the briefing *before* it was filed and three days before the Petition was docketed. The Department has consistently, intensely, and even opportunistically participated in numerous cases concerning Section 4.33.3 of ADAAG and small theater venues, including appearances as party or *amicus curiae* in the First, Second, Third, Fifth, Sixth, and Ninth Circuits. This *five-year* campaign of litigation, designed to impose new law without compliance with the Administrative Procedure Act, is discussed at length in Regal's Petition and the various *amici curiae* briefs filed in this case by Cinemark USA, Inc., AMC Entertainment, Inc., Loew's Cineplex Entertainment Corp., Hoyts Theaters, Inc., and the National Association of Theatre Owners.[2]

In an apparent attempt to minimize the importance of the circuit conflict, Respondents focus much argument on their view that *Stewmon* is correct and *Lara* is wrong.[3] This undue focus on merits detracts not at all from the existence of the

2. Similarly, the Department fully participated in the court below, not as conventional "friend of the court" on a point of law, but as unabashedly partisan advocate on every issue presented. In this and other cases, the Department "introduced" evidence and asserted unvetted "industry" studies. It is the Department's arguments, not Stewmon's arguments, that dominate both the majority and dissenting opinions.

3. The Sixth Circuit's decision in *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003), decided after Regal's Petition was filed in this case, adds to the conflict. The Sixth Circuit expressly disagreed with the Fifth Circuit on the issue of whether providing "lines of sight comparable" under Section 4.33.3 of ADAAG requires consideration of "viewing angles." Far from presenting a unified position against the Fifth Circuit, as Respondents argue, the Sixth Circuit appears to differ from the Ninth Circuit on the scope of deference. *Compare United States v. Cinemark*, 348 F.3d at 579, *with Stewmon*, 339 F.3d at 1133. Moreover, the Sixth Circuit decision supports Petitioner's view that imposing the government's new standard retroactively would be inappropriate. *See United States v. Cinemark*, 348 F.3d at 581-82 (recognizing that Cinemark's reliance on a DOJ-approved state certification code weighs heavily in favor of prospective relief only); Regal's Petition at 26-29.

circuit conflict or the problems inherent in such conflict. By interpreting the same federal law differently, federal circuits and agencies are unduly burdening the building of places of public accommodation. Moreover, virtually all of Respondents' "correctness" arguments are predicated on the assumption that a "viewing angle" requirement "interpreted" from Section 4.33.3 of ADAAG exists in the first place, which is obviously a core area of disagreement in the cases.

Respondents' position is further undermined by stunning misstatements of fact. It is simply not correct that "over half" of the wheelchair seating at the subject movie theaters is located in the front row. Respondents' Brief at 3. More to the point, even where specific auditoria provide front row wheelchair spaces, most provide additional wheelchair seating in the third, fourth, or fifth rows as well. *The record is undisputed on this point.* Thus, and contrary to Respondents' assertions, individuals using wheelchairs need not sit in the front row in the majority of auditoria at issue *unless they choose to do so.* Similarly, *no* record evidence supports Respondents' statement that "the view [of the movie screen] from the sloped section is partially obstructed." *Id.* at 3 n.1. (Nor is vertical rise the only issue relevant to view over forward sitting patrons as implied by Respondents in footnote 1 of their Brief.) The record is uncontested that all wheelchair seating locations at issue in this case provide unobstructed views to the movie screen.[4]

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4. Furthermore, and as elsewhere acknowledged, these theaters were early versions of the "stadium-style" design. As Regal and others refined their designs (*see, e.g.*, NATO *Amici Curiae* Brief at 4), few, if any, wheelchair seating was placed in the front row. Respondents' reports of viewing angles of "24 to 60 degrees" (Respondents' Brief at 3-4) are also misleading, since these angles were measured from the seats to the *top* of the movie screen, as opposed to a natural focal point at or near the center of the movie screen. Respondents also fail to mention that there is no record evidence establishing that the disputed "SMPTE guideline" they cite (*id.* at 5) constituted industry practice, or was even generally known to the industry. SMPTE itself cautioned that its "guideline" was only intended to be "tutorial," conceded that it may not be technically adequate, opined that enforcement of it may not be "fair," and ultimately repealed the guideline in March 2003. Objections to the SMPTE guideline were never ruled on by the district court because summary judgment in favor of Regal made evidentiary issues irrelevant.

Despite the fact that the two largest circuit courts in the nation are irreconcilably opposed on the core issue, Respondents illogically suggest that "further percolation in the lower courts is appropriate" and "the conflict in the circuits may well resolve itself." *See* Respondents' Brief at 7, 12. As the experiences of numerous *amici curiae* clearly demonstrate, however, each new decision has wrought additional confusion and additional DOJ inconsistency. *See, e.g.*, Cinemark's *Amicus Curiae* Brief at 3-10 (discussing the DOJ's meandering interpretations of Section 4.33.3 and repeated efforts to avoid APA review and discovery in the Fifth Circuit, the Sixth Circuit, and their respective federal district courts); Hoyts' *Amicus Curiae* Brief at 3-19 (discussing how DOJ has varied its position on Section 4.33.3, as communicated on the DOJ's technical assistance ADA "helpline" and its shifting litigation positions in the First Circuit, the Second Circuit, and their respective federal district courts). Additional time will not resolve the present circuit conflict, it will simply do more damage to an industry already burdened with "impossible uncertainty."

Respondents' suggestion that review is unnecessary because "the Access Board might address this issue in the current round of revisions to the ADAAG" (Respondents' Brief at 7) is wholly disingenuous. Not only do Respondents engage in self-serving speculation, but they ignore the need to determine what the law was at the time the theaters in question were built. Nor will the Access Board have the final word on regulations concerning private facilities doing business as places of public accommodation (as opposed to federal funded buildings). Far from indicating any intention to resolve the pending controversy by formal rulemaking, the DOJ has denied an industry petition for rulemaking and ignored repeated admonishments by federal courts that it ought to have imposed its interpretation of Section 4.33.3 through notice and comment rulemaking. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 92-93 (D. Mass. 2003) ("the Cinemas are not entirely wrong to castigate the Government for engaging in judicial legislation . . . [a]s matter of policy, the executive should be discouraged from attempting to get the courts do for it what it ought do for itself through the rulemaking

process"); *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1298 n.2 (D. Or. 2001) ("the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"); NATO *Amici Curiae* Brief at 3, App. 1a-21a (discussing the DOJ's denial of NATO's formal petition for rulemaking on Section 4.33.3 in April of 2003 and documenting the DOJ's statement that "the Department is planning to review and amend the ADA regulations in the next year," which the DOJ never did).

The consequences of this circuit conflict are obvious, severe, and pervasive. The legality of an entire industry's core public accommodation infrastructure is now put in jeopardy by a Ninth Circuit decision that has aptly been described as "unjust," "unreasonable," "irresponsible," and "no help at all to theater owners trying to comply with the law."[5] *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).[6]

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5. These criticisms, valid in their own right, have even greater significance when considered in the construction context presented here, where architects, builders, and owners responsible for designing and constructing public accommodations require full and fair notice of precise, objective standards that they can clearly understand and rely upon. *See Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 968 F. Supp. 210, 216 (D.N.J. 1997) ("If the law is to impose certain requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations."), 217 ("[c]onsiderations of due process and the realities of building large, expensive facilities counsel against the courts making architectural, design or engineering judgments in the guise of statutory interpretation"), *aff'd in part, rev'd in part*, 193 F.3d 730 (3d Cir. 1999).

6. By opining that inconsistent interpretations of Section 4.33.3 "impose[] no greater burden on architects and interstate enterprises than they face all the time in seeking to comply with diverse local building codes" (Respondents' Brief at 12-13 n.4), Respondents ignore that Congress intended that *federal* accessibility regulations be stated clearly, with notice, and interpreted uniformly. Moreover, such a comment incorrectly presumes that the Ninth Circuit's *Stewmon* opinion is reasonably comprehensible in the first place, which it quite plainly is not. *See Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) (characterizing the majority opinion as "vague" and questioning, "If a judge on the panel cannot say just what is required [by this decision], how can a movie theater owner?").

B. The Court Should Grant Certiorari To Resolve A Profoundly Important Circuit Conflict Regarding The Sources Of, And Limits On, Judicial Deference To Agency Interpretations Of Their Own Regulations.

Respondents' opposition to granting certiorari on the judicial deference issue presented by Regal is predicated exclusively on the argument that there is "no conflict in the circuits." *See* Respondents' Brief at 16. Yet, Respondents cannot seriously dispute that the Ninth Circuit majority and the Sixth Circuit both concluded that the DOJ's purported interpretation of Section 4.33.3 was deserving of deference.[7] These cases thus directly conflict with the Fifth Circuit's decision in *Lara*, 207 F.3d at 788-89, a case whose factual underpinnings could not have been more similar. Both *Stewmon* and *Lara* involved DOJ appearances as *amicus curiae* espousing a new interpretation of the same ADAAG construction standard.[8]

Similarly, in *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999), the Third Circuit rejected another DOJ "interpretation" of Section 4.33.3, as set forth in

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7. In *United States v. Cinemark*, the Sixth Circuit commented that "the DOJ's interpretation should be upheld unless it is "plainly erroneous or inconsistent with the regulation." *United States v. Cinemark*, 348 F.3d at 578-79. This statement does not even seem to require the low threshold of *reasonableness* of interpretation, as would be required if *Chevron*-type deference was warranted. *United States v. Cinemark*, 348 F.3d at 578-79. *See also Stewmon*, 339 F.3d at 1132. Accordance of greater than *Chevron* deference to an agency's informal litigating interpretation of a regulation certainly constitutes a conflict with numerous other cases discussed herein.

8. Moreover, the Ninth and Sixth Circuit decisions both failed to examine whether the DOJ was truly "interpreting" the language of Section 4.33.3, as opposed to amending the regulation. Such inquiry is a threshold issue implicitly recognized in *Lara*, 207 F.3d at 788-89, and in such cases as *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), and *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999). The mere fact that the DOJ called its new rule "interpretative" should not end the analysis. *See* Cinemark's *Amicus Curiae* Brief at 14-18. Furthermore, the Ninth and the Sixth Circuits also failed to give due effect to Title III's emphasis on the establishment of clear, authoritative, and prospective guidance to builders. *See* AMC and Lowe's *Amici Curiae* Brief at 8-20; NATO *Amici Curiae* Brief at 15-20.

a guidance manual. That court recognized that the DOJ was not free to amend through "interpretation" that which Congress decreed should be amended in accordance with the notice and comment procedures of the APA.[9]

The circuit conflict is broader than simply whether to defer to a DOJ interpretation of Section 4.33.3 of ADAAG. By deferring to a government agency under the circumstances here, the Sixth and Ninth Circuits stand in stark conflict with other cases in which courts have refused to give any deference, or accorded little deference, to government agency litigation positions and other informal pronouncements. In *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999), the Fifth Circuit expressly held that an agency litigation position was not entitled to deference. In a particularly detailed analysis, the Seventh Circuit declined to defer to an agency's litigation position purporting to interpret its own regulation in *Hoctor v. United States Department of Agriculture*, 82 F.3d at 172. Similarly, in *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d at 563, the same court accorded little deference to an agency's *amicus* brief. In *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000), the D.C. Circuit commented that litigating positions may not reflect the fair and considered judgment of the agency. *See also Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997).

The conflict in the circuits seems to be rooted in how the lower courts reconcile *Auer v. Robbins*, 519 U.S. 452 (1997), with other pronouncements of this Court, including *Christensen v. Harris County*, 529 U.S. 576 (2000). As explained in a decision

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9. *But see Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584-85 (D.C. Cir. 1997) (reluctantly deferring to the DOJ's interpretation); *see also Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (rejecting the DOJ's interpretation). For a detailed analysis of the deference issues presented in the *Caruso* and *D.C. Arena* cases, see AMC and Loew's *Amici Curiae* Brief at 14-16. *See also* NATO *Amici Curiae* Brief at 17-19.

published just two days after Regal's petition for certiorari was filed:

> The government's interpretation of the scope of our review is not saved by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* because it is found only in a brief, and briefs, it seems, get limited deference. Our hedge ("it seems") is because *Auer v. Robbins* gave full *Chevron* deference to an agency's *amicus curiae* brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack of the force of law – do not warrant *Chevron*-style deference." Briefs certainly don't have "the force of law." . . . Probably there is little left of *Auer*. . . . It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

Keys v. Barnhart, 347 F.3d 990, 993-94 (7th Cir. 2003) (citations omitted).[10] While the cases listed above do not comprehensively document the full circuit conflict on this issue, they provide ample examples for the fact that the issue is recurring and requires this Court's attention.

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10. Respondents' argument that the present case is an inappropriate vehicle for considering the deference to be accorded to agency litigating positions because "the regulation at issue here plainly compels the interpretation the Department of Justice has placed on it" (Respondents' Brief at 16 n.5) again inappropriately subsumes the review issue in a merits argument.

C. The Court Should Grant Certiorari To Resolve Circuit Disagreement Regarding Fair Notice And Constitutional Due Process Implications Of Permitting The Imposition Of Post-Construction Retrofitting Remedies.

The DOJ's belated, post-construction announcement of a "viewing angle" interpretation now subjects an entire industry to crushing retrofitting liabilities. *See* Regal's Petition at 7; Cinemark USA, Inc.'s *Amicus Curiae* Brief at 5-6; Hoyts Cinemas Corp.'s *Amicus Curiae* Brief at 11; NATO's *Amici Curiae* Brief at 6-7. It is a fundamental principle of fair governance that individuals be given fair notice of obligations. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995); *see also Gates & Fox Co., Inc. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) ("the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires"). The decision below ignores this basic truth. *See also* AMC and Loew's *Amici Curiae* Brief at 16 n.11.

The fact that the federal courts cannot agree on whether a "viewing angle" requirement can lawfully be interpreted from Section 4.33.3 of ADAAG should preclude stadium-style movie theaters built prior to Regal's knowledge of the DOJ's "viewing angle" interpretation from being subjected to post-construction retrofitting remedies. The unfairly punitive implications of the *Stewmon* majority's decision prompted this comment from Judge Kleinfeld:

> [U]nder today's decision, retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time. They must rebuild them to satisfy the architectural inferences design professionals will have to draw from today's opinion. Those inferences are obscure and debatable. . . . It is irresponsible to impose on

> the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done.

Stewmon, 339 F.3d at 1134 (Kleinfeld, J., dissenting). *See also* AMC and Loew's *Amici Curiae* Brief at 13 n.8. Review should be granted to protect designers, builders, and owners of places of public accommodation across the nation from these catastrophic retrofitting burdens.

CONCLUSION

The realities of designing and building places of public accommodation militate strongly against permitting governmental agencies to flexibly "interpret" new substantive construction requirements into existing regulations or allowing courts to use the guise of "broad" statutory and regulatory interpretation to justify post-construction second-guessing of architectural and engineering judgments. The Ninth Circuit's *Stewmon* decision has unfairly distressed an entire industry, portends ruinous financial consequences, and condemns builders across the nation to a state of paralyzing ambiguity. It is vitally important that the Court grant review and definitively resolve the present circuit conflicts by providing clear guidance on statutory and regulatory interpretation, agency deference, and the fair notice and due process implications of any retroactive remedy.

For the foregoing reasons, the Court should grant Regal Cinemas, Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

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No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioners, Regal Cinemas, Inc. and Eastgate Theatre, Inc., are both ultimately owned by Regal Entertainment Group, which is publicly traded.

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I. INTRODUCTION

The Department of Justice is heavily invested in its six-year litigation campaign against the motion picture theater industry. This nationwide campaign has resulted in a clear and irreconcilable conflict in the circuits and copycat litigation exploding in still other circuits. The Solicitor General soothingly assures the Court that the conflict is "shallow" and will magically disappear with the combination of Access Board rulemaking, which "will then be followed" by DOJ rulemaking. U.S. Brief at 8. The Solicitor General is wrong on all counts. There is a clear conflict here and now, it is wreaking havoc here and now, and the "wait until tomorrow" solution promised by the Solicitor General is illusory, unrealistic, and incapable of washing out the vital issues in this closely-watched case.

The Government's dismissive attitude comes with ill grace in view of the dismay expressed by numerous federal judges over the Department of Justice's decision to govern through litigation and *amicus* briefs rather than through rulemaking.[1] Despite a congressional mandate to produce clear guidance in

1. *See, e.g., United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 92-93 (D. Mass. 2003) (chastising the agency for being "lethargic in its rulemaking capacity" and "instead cho[osing] to bring lawsuits," and proclaiming "[a]s a matter of policy, the executive should be discouraged from attempting to get the courts do for it what it ought do for itself through the rulemaking process"); *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1298 n.2 (D. Or. 2001) (acknowledging Regal's "moving target" criticism of the DOJ and opining that "the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"), *rev'd, Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003); *see also Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 174 F.3d 166, 177 ("Indeed, the DOJ probably could have achieved [its goal that wheelchair users be given lines of sight equivalent to standing patrons] already had it followed th[e] course [of notice and comment rulemaking] initially."), *vacated and superceded by* 193 F.3d 730, 737 (3d Cir. 1999) (to "adopt a new substantive regulation[,] [the DOJ] must proceed with notice-and-comment rulemaking").

its construction regulations, the Department has long rejected the notice and comment procedures suggested by courts in favor of a game of interpretive hide and seek that has thrown an entire industry into utter confusion. Notwithstanding the Government's efforts to marginalize the Fifth Circuit's decision in *Lara*, in truth, the district and circuit courts are all over the map in interpreting and deferring to the DOJ on this regulation and, if anything, it is the two-judge majority panel decision in *Stewmon* that stands on the fringe.[2]

This case is a particularly strong vehicle for resolving these conflicts. In enacting Title III of the ADA, Congress took great pains to ensure that designers, owners, and builders had clear and adequate notice of accessibility obligations. Under the circumstances of this statute, the Court should review whether a federal agency may impose substantive requirements via a purported, but not genuine, "interpretation" of its own regulation. The lower courts are hopelessly divided and, absent review by this Court, the reliability and finality of all accessibility regulations will remain in question. Moreover, as nothing limits the Ninth Circuit majority's holdings to the particular regulatory

2. Judge B. Fletcher's opinion for the divided panel in *Stewmon* sits at the outer edge of this mass of confusion. The unanimous panel of the Fifth Circuit (Judges Davis, Garwood, and Politz), the Northern District of Ohio (Judge Nugent), the District of Oregon (Judge King), the Northern District of New York (Judge Hurd), and the Ninth Circuit's Judge Kleinfeld each disagree, in reasoning and result, with the *Stewmon* majority opinion. Moreover, far from presenting the unified position against the Fifth Circuit that the Government suggests, the Sixth Circuit differs from the Ninth Circuit on the scope of deference to accord to the DOJ's interpretation of Standard 4.33.3. *Compare United States v. Cinemark USA, Inc.*, 348 F.3d 569, 579 (6th Cir. 2003), *with Stewmon*, 339 F.3d at 1133. Both the Sixth Circuit and the District of Massachusetts (Judge Young) depart dramatically from the Ninth Circuit on the fair notice argument as well. *See United States v. Cinemark*, 348 F.3d at 581-82 (suggesting that facts weigh heavily in favor of prospective relief only); *United States v. Hoyts*, 256 F. Supp. 2d at 91-93; *see also* Regal Petition for Certiorari at 25-29; Regal Reply Brief at 4-5; Hoyts *Amicus* Brief at 15 n.10.

context of Title III of the ADA, all other regulated industries now face comparable uncertainty.

II. ARGUMENTS

A. The Access Board's Anticipated Revisions Of ADAAG Will Neither Resolve Nor Minimize The Circuit Conflicts Presented In This Case.

Since at least 1998, the DOJ has pursued a policy of amending ADA Standard 4.33.3 via litigation and *amicus* brief. The Government has denied the industry's petition for rulemaking and ignored repeated admonishments from federal courts that a rulemaking solution would be preferable to litigation. *See* note 1, *supra*; *see also* NATO *Amicus* Brief at 2-3 & App. 1a-21a; Hoyts *Amicus* Brief at 8-9; Cinemark Petition for Certiorari, No. 03-1131, at 10 n.9. Now, however, the Government seeks to avoid this Court's review by asserting, of all things, the possibility of future rulemaking. There are several fundamental problems with the Government's position.

First, the Solicitor General's assertion that a definitive regulatory pronouncement is about to be promulgated is not correct. By arguing that supposedly upcoming design revisions emanating from the Access Board will somehow "resolve" the circuit conflict over Standard 4.33.3, the Government confuses the ADAAG with the actual regulations at issue in this case, the DOJ's "ADA Standards for Accessible Design," also called "JDSAD," or, more commonly, the "ADA Standards." The terms "ADAAG" and "ADA Standards" have often been used interchangeably by builders, inspectors, design professionals, *amici*, parties in this case, and even the various courts. This common practice caused no problem previously because the ADAAG and the ADA Standards are essentially identical, and ADAAG 4.33.3 and ADA Standard 4.33.3 are verbatim identical.[3] Since July 26, 1991, however, the ADAAG's

3. In 1991, the DOJ and the Access Board engaged in simultaneous (Cont'd)

application to privately-owned facilities regulated under Title III of the ADA is, as a matter of law, merely advisory. 42 U.S.C. § 12204(a); 42 U.S.C. § 12186(b), (c).[4] Congress delegated to the DOJ, not the Access Board, responsibility for rulemaking under Title III, and thus it is the DOJ's own ADA Standards that are legally enforceable on private facilities, not the Access Board's ADAAG. *See id.*; *accord* DOJ *Amicus* Brief for Appellants at 11, *Stewmon v. Regal Cinemas, Inc.*, Supp. App. 1a-2a ("[t]he Attorney General has the sole power to issue binding regulations to carry our [Title III's] 'new construction' provisions"); Access Board, *Draft Final ADA and ABA Accessibility Guidelines* § 101 (April 2002) (stating that "draft" guidelines "are to be applied . . . to the extent required *by regulations issued by Federal agencies* under the Americans with Disabilities Act") (emphasis added).[5] In sum, the Access

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notice and comment rulemaking, and the DOJ adopted the ADAAG without modification as its own design standards in July of 1991. Not so in 1999-2004. The DOJ has not even commenced rulemaking on any potential amendment of ADA Standard 4.33.3.

4. While Congress charged the Access Board with the original responsibility to issue "minimum guidelines" for implementing Title III (42 U.S.C. § 12204(a)), and further provided that, in the event the Attorney General failed to timely promulgate regulations to implement Title III, compliance with the Access Board's guidelines would be sufficient to "satisfy the requirement[s]" of Title III (42 U.S.C. § 12186(d)), this contingent legal effect was obviated by the DOJ's issuance of its own design standards on July 26, 1991.

5. The DOJ has repeatedly emphasized this point in lawsuits against other movie theater exhibitors. *See, e.g.*, DOJ Opening Brief for Appellant at 25-26, *United States v. Cinemark USA, Inc.*, Supp. App. 3a-4a ("The Department of Justice, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here . . . the Board's guidelines do not themselves have the force of law."); DOJ *Amicus Curiae* Brief for Appellants at 20-21, *Meineker v. Hoyts Cinemas Corp.*, Supp. App.
(Cont'd)

Board's ADAAG and the DOJ's ADA Standards are not the same thing, and the DOJ has not even *begun* the multi-year process of review and amendment for its own ADA Standards.[6]

Second, even assuming that a regulation was actually forthcoming, it would necessarily have prospective application only. This would be cold comfort to an industry facing ruinous retrofitting liabilities. As the Solicitor General implicitly admits, stadium-style theaters have been built by the thousands since 1995, most before the DOJ's *de facto* amendment of Standard 4.33.3. These theaters, many approved by state inspectors under parallel and even DOJ "certified" codes, are now unlawful, prompting Judge Kleinfeld's observation that:

> under [the Ninth Circuit majority's] decision, retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time.

(Cont'd)

5a-6a ("The Department, not the Access Board, has the sole authority to issue binding regulations to implement [Title III's] statutory provisions."); DOJ Reply Brief in Support of Motion for Summary Judgment for Plaintiff at 5-6, *United States v. AMC Entm't, Inc.*, Supp. App. 7a-9a ("[t]he Department of Justice alone is congressionally-tasked with promulgating binding regulations under Title III of the ADA").

6. Even the Solicitor General's assessment that the *Access Board* is "close to completing" a "forthcoming promulgation" of ADAAG revisions may be overly optimistic. It took the Access Board ten years to approve its draft "final rule" for submission to the Office of Management and Budget. *See* Hoyts *Amicus* Brief at 8 & App. 1a-2a; Access Board, *Revision of ADA and ABA Accessibility Guidelines*, <*http://www.access-board.gov/ada-aba/status.htm*>. Furthermore, additional notice and comment is likely once the ADAAG's "final guidelines" emerge from OMB.

Stewmon, 339 F.3d at 1134 (Kleinfeld, J., dissenting). Theater owners received no guidance when they needed it most. Hoyts *Amicus* Brief at 8-10; Cinemark *Amicus* Brief at 5-6. Promulgating a rule now, without addressing the retroactive application of the DOJ's "interpretation," solves nothing.

Allowing the Government to conjure up imminent regulations as a means of defeating review in this Court immunizes and encourages a deeply irresponsible strategic approach to administrative lawmaking. The DOJ rejected the theater industry's 1999 petition for rulemaking with respect to Standard 4.33.3. No doubt this refusal stemmed significantly from the fact that such rulemaking would undermine the Department's litigating position. But having thus refused rulemaking in order to protect its briefing position, the Government should not now be allowed to protect itself against further judicial review through the *deus ex machina* of new regulations dropped from the heavens.

B. The Circuit Conflicts Are Deep, Irreconcilable, And Intolerable.

Admitting, as it must, the existing circuit conflicts, the Government argues that federal accessibility laws are not "an area in which uniformity is especially vital." U.S. Brief at 9. The Government suggests that designers, owners, and builders could mitigate the impact of the circuit conflicts by treating the different appellate court interpretations of a single federal statute as akin to varying state and local building codes. U.S. Brief at 9-10. This argument of convenience is plainly inconsistent with congressional intent. *See, e.g.*, Cinemark *Amicus* Brief at 3-5; AMC *Amicus* Brief at 10-16; Cinemark Petition for Certiorari at 2-3, 20-22.[7] And the burden on the nation's builders is simply too high. *See, e.g., Stewmon*, 339

7. The Government's suggestion that builders simply emulate "the requirements . . . as enforced by the Sixth and Ninth Circuits" is also unworkable. As Judge Kleinfeld observed, the Ninth Circuit's holding is "no help at all to theater owners trying to comply with the law." *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

F.3d at 1134 (Kleinfeld, J., dissenting); NATO *Amicus* Brief at 13-15; AMC *Amicus* Brief at 13 n.8.

The Government itself has never demonstrated any willingness to respect the "piecemeal compliance" solution it proposes to this Court. In litigation against individual theater operators, the DOJ has consistently pursued liability findings that extend well beyond the geographic boundaries of the circuits where the lawsuits are filed.[8] And the Government's use of *amicus*, combined with its assertions of collateral estoppel immunity, permits the DOJ to litigate against a theater company unsuccessfully as partisan *amicus curiae* in one circuit, and later litigate against the same theater company as party-plaintiff in another circuit. *See United States v. Cinemark*, 348 F.3d at 583-84.

C. The Ninth Circuit's Decision Is A Proper Vehicle For Reviewing The Conflicts Presented In This Case.

The present case is a proper vehicle for review on the questions raised by Regal. The Ninth Circuit majority not only reversed the district court's final judgment in favor of Regal, it *issued express instructions to grant summary judgment in favor of Respondents*, which, as Judge Kleinfeld recognized, retroactively placed thousands of movie theaters out of compliance. *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

While the Government suggests that the fair notice issue will be taken up on remand, it points to nothing in the Ninth

8. To this day, the DOJ continues to maintain lawsuits concerning theaters located within the geographic boundaries of the Fifth Circuit, despite authoritative Fifth Circuit precedent that rejects the agency's litigating position. *See, e.g.*, Brief in Opposition to Defendant's Motion for Partial Summary Judgment at 4-6, *United States v. Cinemark*, Supp. App. at 10a-13a. At least one court has accepted the DOJ's position on this point. *See AMC Entm't, Inc.*, 232 F. Supp. 2d at 1114-15. For additional discussions of multiple circuit litigation by the DOJ against single movie theater operators, see Cinemark *Amicus* Brief at 6-8 and Hoyts *Amicus* Brief at 1-2.

Circuit majority's opinion to support this proposition, creating out of the blue, instead, a claim that Regal "concedes" this point. U.S. Brief at 19. One would search Regal's Petition for Certiorari in vain, however, for the evidence of that proffered "concession." On the referenced page, Regal merely laments the majority's failure to even *address* the issue of fair notice. Judge Kleinfeld makes a similar observation. *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

Also in direct contrast to Judge Kleinfeld's views, the Government argues that the Ninth Circuit's retroactive ruling "need not" have "dire" consequences for the industry. *See* U.S. Brief at 19-20. Strangely, the Government's sole support for this proposition is a citation to a footnote in the Sixth Circuit's *United States v. Cinemark* opinion documenting the DOJ's last minute "assurances" to a judicial panel whose hackles were raised by the Government's unfair approach to notice. *See* U.S. Brief at 20. The Government does not bother to explain how that opinion or footnote provides any assurances to *Regal*, or to others doing business in the *Ninth Circuit*, against *private* plaintiffs such as Stewmon. Belated assurances aside, and given the Government's position on nonmutual collateral estoppel and its proven non-acquiescence on Standard 4.33.3, the Government's vague promise to be "reasonable" in the Sixth Circuit leaves much margin for mischief.

D. The Government's Various Merits Arguments Do Not Obscure Or Diminish The Pending Circuit Conflicts.

The Government attempts to obscure the certiorari issues with merits arguments that neither minimize the very real conflicts between three of the most populous and influential circuits in the country nor mitigate the "impossible uncertainty" described by Judge Kleinfeld.[9] Moreover, much of the

9. Nothing in the cases cited by the Solicitor General as recent pronouncements of the deference standard for agency interpretation of regulations suggests that this Court's review is unnecessary. Indeed, these decisions are largely nonresponsive to the question of what makes one (Cont'd)

Government's argument is based on citations to hand-selected and unrepresentative "industry reports" and other "evidence" that were not a part of the record before the district court, and to which Regal has had no real opportunity for rebuttal. And other than the SMPTE report, which the Government fails to mention is now rescinded (*see* SMPTE, *Engineering Committees*, available at <http://www.smpte.org/engineering_committees/>), none of these publications were relied upon in the *Lara amicus* brief.

Accepting the Government's premise also requires one to conclude that numerous neutral governmental inspectors, several federal courts, and the entire movie theater industry independently misconstrued the regulation in the same disastrously "wrong" way. The Government's position also ignores that the DOJ facilitated these "wrong" interpretations. *See, e.g.*, Hoyts *Amicus* Brief at 9-10; Cinemark *Amicus* Brief at 5, 10; AMC *Amicus* Brief at 2-3; *see also* Cinemark's Petition for Certiorari at 4-6 (state codes).

The mere fact that in six years of litigation against an entire industry, the Government has yet to identify a single stadium-style theater built prior to 1998 that it believes was correctly designed, is telling. Even more compelling, however, is the fact

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(Cont'd)
"interpretation" entitled to controlling deference when another is not. The Court's statement in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), that "whether a court should give [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue" does not settle this issue or provide guidance sufficient to explain the different results in the cases cited by Regal in its Petition for Certiorari. Moreover, none of the cases relied upon by the Solicitor General involve an agency interpretation of a regulation that is only articulated in litigation briefs, by agency trial attorneys, stated differently virtually every time the agency has call to articulate it, and announced months or even years after the allegedly discriminatory theaters were designed and constructed. *See* NATO *Amicus* Brief at 3-4, 13; Hoyts *Amicus* Brief at 2-3, 7-16; Cinemark Petition for Certiorari at 6-9, 22-23.

that neutral state officials, applying DOJ-certified codes, gave pre- and post-construction approval to theaters that the DOJ now says were incorrectly designed. *See generally* Cinemark *Amicus* Brief at 2-5; Cinemark Petition for Certiorari at 6. And the Government fails to point to a single instance, prior to July 1998, in which it provided technical assistance to a movie theater operator by revealing its current position on the meaning of "lines of sight comparable." Nor is the Government able to point to any pre-*Lara* enforcement action or settlement agreement in which it articulated the "viewing angles" requirements that it now asserts, despite the fact that literally thousands of stadium-style movie theaters were constructed between 1995 and 1998. Hoyts *Amicus* Brief at 11; Cinemark *Amicus* Brief at 3; AMC *Amicus* Brief at 3. Perhaps hoping to capitalize on the inherent difficulty of "proving a negative," the Government nonetheless boldly asserts that it has "consistently" interpreted the "lines of sight comparable" language of Standard 4.33.3. The truth is otherwise, as every movie theater chain can attest. *See* NATO *Amicus* Brief at 3, 4, and n.6, 13; Hoyts *Amicus* Brief at 2-3, 7-16; Cinemark Petition for Certiorari at 6-9, 22-23 and n.16; *see also OPVA*, 142 F. Supp. 2d at 1297 n.2.

III. CONCLUSION

Despite its deliberate decision to forego notice and comment rulemaking in favor of litigation, when it is now presented with an opportunity for this Court to review the circuit conflicts that its multi-year litigation efforts have wrought, the Government reverses position and makes the hollow promise that the conflicts will be resolved by future rulemaking. The Ninth Circuit's decision has rewarded regulatory amendment by *amicus* brief and conscious manipulation of judicial deference doctrines. The DOJ's rulemaking by *amicus* is unfettered by public participation, virtually unaccountable to the courts, and disregards Congress's mandate. The DOJ has created intolerable circuit conflict. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL FILED OCTOBER 19, 2001

No. 01-35554

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PARALYZED VETERANS OF AMERICA,
an Oregon non-profit corporation,

Plaintiff,

and

KATHY STEWMON; TINA SMITH; KATHY BRADDY,

Plaintiffs-Appellants,

v.

REGAL CINEMAS, INC.,
a Tennessee corporation doing business in Oregon;
EASTGATE THEATRE, INC., d/b/a Act III Theater,

Defendants-Appellees.

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING
APPELLANTS AND URGING REVERSAL

Appendix A

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* * *

The Department of Justice has principal authority for administering the provisions of the ADA that govern the design and construction of new facilities. The Attorney General has the sole power to issue binding regulations to carry out those "new construction" provisions. See 42 U.S.C. 12186(b); see also 42 U.S.C. 12183(a)(1). And the Department of Justice is the only federal agency with authority to enforce Title III of the ADA, which includes the new construction requirements. See 42 U.S.C. 12188(b)(1)(B.)

* * * *

APPENDIX B — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS APPELLANT FILED JUNE 5, 2002

No. 02-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLANT

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Appendix B

* * *

The Department of Justice, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Those regulations must be "consistent with the minimum guidelines and requirements issued by the" Access Board. 42 U.S.C. 12186(c). But the Board is not required to approve the Department's standards, and the Board's guidelines do not themselves have the force of law. They merely set minimum guidelines for the Attorney General's regulations to follow. As the Board itself has recognized, the Attorney General is free to issue rules that "exceed the Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991).

* * * *

APPENDIX C — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL FILED DECEMBER 16, 2002

No. 02-9034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN MEINEKER and SYBIL MCPHERSON,

Plaintiffs-Appellants,

v.

HOYTS CINEMAS CORPORATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

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Appendix C

* * *

At any rate, the Fifth Circuit erred in assuming that the Access Board's post-1991 interpretation of Standard 4.33.3 could limit the authority of the Department of Justice to construe its own regulation. The Department, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Therefore, although the Access Board originally drafted the comparable "lines of sight" language that the Department of Justice adopted in Standard 4.33.3, it is the Department's views – not the Access Board's – to which the courts owe deference in determining the meaning of the Department's regulation.

* * * *

APPENDIX D — EXCERPTS FROM REPLY MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LINE OF SIGHT ISSUES FILED NOVEMBER 12, 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV-99-01034-FMC (SHx)

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMC ENTERTAINMENT, INC., *et al.*,

Defendants.

REPLY MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
RE: LINE OF SIGHT ISSUES

DATE: Nov. 18, 2002
TIME: 10:00 a.m.
JUDGE: Hon. Florence-Marie Cooper

Appendix D

* * *

The Department of Justice alone is congressionally-tasked with promulgating binding regulations under Title III of the ADA, and this regulatory authority includes the discretion to "exceed the [Access] Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991). Pursuant to Congress' delegated regulatory authority, the Department in 1991 issued final regulations — after notice-and-comment rulemaking — to govern new construction of, and alterations to, Title III-covered facilities. *See* US SJ Mem. at 5-6 (discussing DOJ Standards for Accessible Design). *Id.*

Thus, whatever Standard 4.33.3's regulatory and linguistic roots, the interpretation and enforcement of this regulation is now the sole responsibility of the Department of Justice.

* * * *

APPENDIX E — EXCERPTS FROM PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT FILED APRIL 26, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

v.

CINEMARK USA, INC.,

Defendant

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT

* * *

Appendix E

ARGUMENT

A. PARTIAL SUMMARY JUDGMENT UNDER *LARA* IS NOT APPROPRIATE AT THIS STAGE OF A PATTERN OR PRACTICE CASE

In order to establish that a "pattern or practice" of discrimination in violation of Title III of the ADA exists, the United States must show that "the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature . . . a company repeatedly and regularly engaged in acts prohibited by the statute." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, n.16 (1977) (citing 110 Cong. Rec. 14270 (1964). Cinemark's many theaters located within the Fifth Circuit constitute part of this "pattern or practice." Discovery about those theaters is necessary to establish that such a pattern or practice of discrimination did in fact occur. The earlier summary judgment decision in this case effectively pre-empted discovery about Cinemark's liability nationwide for ADA Title III violations in failing to provide "comparable lines of sight" for wheelchair seating in Cinemark theaters, leaving the current fact record upon remand almost completely undeveloped. Moreover, nothing in the Sixth Circuit's decision, the briefs filed by the United States in this case, representations at oral argument by counsel for the United States, published opinion, or caselaw, supports Cinemark's specious claim that its stadium-style movie theaters within the Fifth Circuit should be excluded from any liability finding in this case, and, as such, these theaters are appropriately included in the United States' case-in-chief on liability and should be subject to adequate and reasonable discovery by the United States.

Appendix E

In the Sixth Circuit, the United States argued that Cinemark's assertion was premature that summary judgment for its theaters located within the Fifth Circuit was appropriate. *See* United States' Reply Brief in the Sixth Circuit at 18-19 (citing *Peveler v. United States*, 269 F.3d 693, 699 (6th Cir. 2001) (attached as Exhibit 1E). "[T]he law in the Fifth Circuit will become relevant at the ***remedial stage*** if the district court finds Cinemark liable on remand. If *Lara* is still the law of the Fifth Circuit at that time, the district court should not order relief regarding the theaters within that Circuit . . . **But, at the present time, one cannot be sure that *Lara* will still be the law of the Fifth Circuit on the 'lines of sight' issue by the time the district court is ready to enter judgment on remand**." *Id.* (Emphasis added; citations omitted.)

The Sixth Circuit denied Cinemark's request to affirm the this Court's grant of summary judgment for all of its theaters located within the Fifth Circuit and agreed with the United States that the *Lara* holding is only relevant at the remedial stage of this litigation, when considering the "scope of relief" for Cinemark's theaters within the Fifth Circuit. Cinemark asked the Sixth Circuit to affirm this court's grant of summary judgment for all of its stadium-style theaters within the Fifth Circuit. *Cinemark*, 348 F.3d at 584. The Sixth Circuit, making short shrift of Cinemark's argument, stated "[t]his pertains to the ***scope of relief***, and therefore is a matter for the district court to decide consistent with the principles of comity." *Id.* (emphasis added); US Opposition, Facts ¶9. This Court should likewise decline Cinemark's invitation to limit review of this case by granting partial summary judgment prematurely.

Appendix E

The Sixth Circuit's opinion and the mandate rule[3] now require that consideration of the effect of the Fifth Circuit's decision in *Lara v. Cinemark* on the instant action be reserved until after a liability ruling on the United States' pattern or practice claims. *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (trial court precluded from reconsidering issue expressly or impliedly decided by appellate court). Summary judgment is not only premature at this time, but would violate the mandate rule.

* * * *

3. Under the mandate rule, after an appellate court has remanded a case to a lower court, the lower court must follow the decision that the apellate court has made in the case, unless new evidence or an intervening change in the law dictates a different result. Black's Law Dictionary (7th ed. 1999).

Supreme Court, U.S.
FILED
NOV 26 2003
OFFICE OF THE CLERK

No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS, INC. AND NATIONAL ASSOCIATION OF THEATRE OWNERS OF CALIFORNIA/NEVADA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE* NATIONAL ASSOCIATION OF THEATRE OWNERS, INC. AND NATIONAL ASSOCIATION OF THEATRE OWNERS OF CALIFORNIA/NEVADA, INC.

This *amici curiae* brief is submitted on behalf of the National Association of Theatre Owners, Inc. ("NATO") and The National Association of Theatre Owners of California/Nevada, Inc. ("NATO of Cal/Nev").[1] NATO is the national trade association of the motion picture theatre industry. Its member operate over 26,000 motion picture screens located in all 50 states, including thousands of stadium-style auditoria. NATO's membership includes the largest theatre chains in the world, as well as hundreds of small independent theatre owners. NATO of Cal/Nev is the trade association of the motion picture theatre industry for theatres located in California and Nevada. NATO of Cal/Nev represents theatre owners operating more than 3,400 auditoria, including numerous stadium-style auditoria. NATO of Cal/Nev's members include the largest theatre chains in the world, as well as small independent theatre owners.

NATO and NATO of Cal/Nev have a substantial interest on behalf of their members in the issues raised in this case. NATO and NATO of Cal/Nev members currently operate thousands of stadium-style motion picture auditoria in the United States, and are in the process of constructing, or planning to construct, numerous additional stadium-style movie auditoria. Virtually all of the thousands of existing stadium-style motion picture auditoria were built after January 26, 1993, and thus are subject to the "new construction" accessibility requirements of the Americans With Disabilities Act, including Section 4.33.3 of the Department of Justice's ("DOJ") Standards for Accessible

1. Pursuant to Sup. Ct. R. 37.6, NATO and NATO of Cal/Nev certify that this *amici curiae* brief was authored in its entirety by NATO and NATO of Cal/Nev and their counsel. No other persons or entities made any monetary contribution to the preparation or submission of this brief. This *amici curiae* brief is being filed with the written consent of both parties. A copy of the letter agreement regarding consent to the filing of *amici curiae* briefs is being filed herewith.

Design, 28 C.F.R. Part 36, which set forth the requirements for the location of wheelchair seating in assembly areas.

Because their members are directly and significantly affected by the accessibility requirements of the Americans With Disabilities Act, Title III, 42 U.S.C. § 12181, *et seq.* ("ADA"), NATO and NATO of Cal/Nev have actively participated in the development of ADA rules and regulations applicable to motion picture theatres. When the notice of the initial rulemaking for ADA Accessibility Guidelines ("ADAAG") was first published in the Federal Register in January 1991, NATO held a series of industry-wide meetings and developed lengthy comments which were submitted to both the Access Board and the DOJ.[2] Thereafter, when the final ADAAG were published in July 1991, NATO met with DOJ staff to discuss the application of the accessibility guidelines generally, as well as Section 4.33.3 in particular, to the motion picture theatre industry. NATO's longstanding interest in the development and application of Section 4.33.3 reflects the critical importance of ensuring that all members of the industry understand the requirements imposed by the ADA prior to the design and construction of new theatres.

In addition, NATO has endeavored to work with both DOJ and the motion picture exhibition industry on ADA compliance issues, including the issues concerning Section 4.33.3 raised in this proceeding. When it became clear that DOJ was articulating a new interpretation of Section 4.33.3 to include the consideration of viewing angles and the subjective preferences of moviegoers, NATO filed a formal citizens'

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2. In its Notice of Proposed Rulemaking, DOJ proposed to adopt as binding regulations the final ADAAG Guidelines to be published by the Access Board, and directed all comments relating to new construction requirements to be sent to the Access Board. *See* Fed. Reg. 7452, 7478-79 (1991). DOJ was a member of the Access Board, and actively participated in drafting the ADAAG. *See* 56 Fed. Reg. at 35586. DOJ ultimately adopted the ADAAG verbatim as its own Standards for Accessible Design. The ADAAG are published at 36 C.F.R. Part 1191.

petition with the Attorney General requesting that DOJ initiate a rulemaking on the very issues raised in this case.[3] Although DOJ declined to initiate a rulemaking to address Section 4.33.3, NATO has actively participated in the Access Board's pending rulemaking to consider revisions to the ADAAG, including Section 4.33.3.[4]

Finally, NATO has closely monitored, and filed *amicus curiae* briefs in connection with, litigation involving the requirements of Section 4.33.3.[5] NATO of Cal/Nev joined with NATO in filing an *amici curiae* brief in the Ninth Circuit. NATO has also monitored DOJ's formal and informal enforcement efforts regarding Section 4.33.3, including the variety of interpretations of Section 4.33.3 advanced by DOJ. Moreover, NATO is familiar with the real world consequences that will necessarily follow if the decision below is upheld, including the enormous costs of retrofitting thousands of auditoria as well as the impossible uncertainty faced by architects and other design professionals when federal accessibility guidelines are vague, ambiguous and open to retroactive reinterpretation. It is essential that the writ of certiorari be granted so that the issues involved in these litigations can be decided once and for all, and so that theatre owners obtain clear guidance on how to build theatres that comply with the requirements of the ADA.

---

3. A copy of NATO's Petition for Rulemaking, dated August 24, 1999, was included in NATO's *amicus curiae* brief before the Ninth Circuit, and is attached hereto as Appendix A for the Court's convenience.

4. A copy of DOJ's letter response to NATO's Petition for Rulemaking was included in NATO's *amicus curiae* brief before the Ninth Circuit, and is attached hereto as Appendix B for the Court's convenience.

5. NATO has filed *amicus curiae* briefs in *Lara v. Cinemark, USA*, 207 F.3d 783 (5th Cir. 2000); *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1125 (9th Cir. 2003); *United States v. Cinemark USA*, 2003 Fed. App. 0395P (6th Cir. 2003); *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 WL 21510423 (2d Cir. July 1, 2003); and *United States v. Hoyts Cinemas Corp.*, No. 03-1646 (1st Cir.) (appeal pending).

STATEMENT OF THE CASE

Congress mandated that DOJ's accessibility requirements, including Section 4.33.3, provide clear and unambiguous guidelines for operators of public accommodations to ensure both that ADA requirements can be designed into newly-constructed facilities and that the need for expensive retrofit construction can be avoided. The Ninth Circuit's decision in this case raises fundamental issues regarding the integrity of the regulatory processes mandated by Congress to implement the ADA as well as the judicial enforcement of those processes. For five long years, DOJ has been seeking to retroactively impose through litigation, a *post hoc* reinterpretation of Section 4.33.3 which would require the retrofit of thousands of motion picture theatre auditoria at enormous cost. At least 12 federal district and circuit courts have been called upon to interpret the "comparable lines of sight" language in Section 4.33.3. A fortune has already been spent litigating and relitigating the meaning of "comparable lines of sight," and yet the issue is no closer to resolution now than it was five years ago. All the while, there have been no clear or specific guidelines to govern the construction of new stadium-style theatres, and the motion picture exhibition industry has been forced to live under a sword of Damocles – a potential retrofit liability likely to be in the hundreds of millions of dollars.[6]

What makes this situation particularly unfortunate is that it could have been easily avoided. Congress clearly understood that the broadly-worded policy of nondiscrimination embodied in the ADA had the potential to impose enormous construction

---

6. The design of stadium-style theatres has evolved over the last five years, as motion picture exhibitors have attempted to respond to the various concerns and conflicting interpretations advanced by DOJ in connection with litigation involving Section 4.33.3. However, good faith attempts by theatre owners to meet DOJ's concerns offer no safe harbor. The constantly changing formulations advanced by DOJ, the vague and subjective considerations on which they are based, and the possibility that DOJ's retroactive interpretations will continue to evolve, make it impossible to predict with any certainty whether any theatre design complies with the ADA.

and operational costs on industry. To ensure that real world considerations of feasibility, practicability and cost were duly considered in implementing the ADA, and to avoid the wasteful expense of retrofitting newly-constructed buildings, Congress established a regulatory process requiring notice and comment rulemaking, clear and specific guidelines for new construction, and ongoing technical assistance by the DOJ. If this regulatory process, mandated by Congress and the ADA itself, had been promptly employed to amend Section 4.33.3 when construction of stadium-style theatres first started, the issues presented here would have long ago been resolved with the issuance of a specific and unambiguous rule. The use of notice and comment rulemaking also would have helped to ensure that any revision to Section 4.33.3 reflected all points of view and was consistent with associated design considerations like safety.

There is nothing in the plain language of Section 4.33.3 or the history of its promulgation to suggest that the Access Board or DOJ intended to impose a "viewing angle" requirement in the placement of wheelchair seating in movie theatres. Similarly, there is nothing in the plain language of Section 4.33.3 or the history of Section 4.33.3 that suggests that the Access Board or the DOJ intended to treat motion picture theatre auditoria differently from all other types of auditoria. Viewing angles are not mentioned in Section 4.33.3, or anywhere else in the ADAAG. Similarly, although the issue of "view obstruction" was expressly discussed in the rulemaking proceedings that led to the promulgation of Section 4.33.3, viewing angles were never mentioned.[7] In fact, at the time Section 4.33.3 was first published

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7. Statements by the Access Board in 1999 offer additional confirmation that Section 4.33.3 was never intended to require consideration of viewing angles. In a Notice of Proposed Rulemaking issued on November 16, 1999, the Access Board noted DOJ's efforts to enforce a new interpretation of Section 4.33.3, and indicated it was considering whether to modify Section 4.33.3 to reflect DOJ's new position. *See* 64 Fed. Reg. at 62278. The Access Board's comments made clear that changes to Section 4.33.3 would be required to codify the new interpretation of Section 4.33.3 advanced by DOJ.

in 1991, virtually all movie theatres were built on sloped floors, and the primary design consideration relevant to all theatre patrons was an unobstructed line of sight to the screen. In this context, the universal understanding of architects and other design professionals was that Section 4.33.3 required that wheelchair-bound moviegoers be afforded the same unobstructed view of the screen enjoyed by ambulatory patrons.[8]

The first stadium-style movie theatres were built in approximately 1994-1995, and within a short time, most new theatre construction incorporated stadium-style designs. DOJ was aware of the construction of stadium-style movie theatres during this period, as well as any impact this new design might have on the location of wheelchair seating in movie theatres. In fact, theatre design professionals raised the issue of the location of wheelchair seating in stadium-style theaters with DOJ's technical personnel manning DOJ's telephone "helpline" during the first few years of stadium-style construction and were told that wheelchair locations could be placed anywhere within the general seating footprint of the theatre including the front row of the non-stadium section.

A rulemaking could have been – indeed, *should* have been – promptly commenced to amend Section 4.33.3 to address any new issues arising in connection with the location of wheelchair seating in stadium-style movie theatres. Rather than commencing a rulemaking to amend Section 4.33.3, however, DOJ chose to sit on its hands while thousands of stadium-style movie theatre auditoria were constructed based upon the reasonable and universal understanding among design professionals that Section 4.33.3 was intended to require that patrons in wheelchair seating be afforded the same unobstructed view to the screen enjoyed by the general public.

When DOJ finally did raise concerns about the location of wheelchair seating in stadium-style movie theatres, it did so not by issuing a notice of proposed rulemaking, but rather by

8. As discussed more fully below, even DOJ technical assistance personnel apparently held this view prior to the first public announcement of DOJ's new interpretation of Section 4.33.3 in 1998.

filing an *amicus curiae* brief in a lawsuit brought by private parties. Specifically, DOJ filed an *amicus* brief in the *Lara* case in July 1998, asserting for the first time that Section 4.33.3 requires the consideration of qualitative "viewing angles" in the placement of wheelchair seating in stadium-style movie theatres. The plain language of Section 4.33.3, the history of its promulgation, and statements by the Access Board that drafted the "comparable lines of sight" language make clear that the consideration of "viewing angles" was a requirement DOJ first claimed should be incorporated into Section 4.33.3, years after that section was enacted. DOJ has never offered any evidence to even suggest that it intended that Section 4.33.3 include a viewing angle component when it was promulgated. For these reasons, in *Lara*, the Fifth Circuit rejected DOJ's attempt to incorporate a viewing angle requirement into Section 4.33.3 that was not intended when Section 4.33.3 was promulgated.

DOJ refused, however, to accept the *Lara* decision, and has pressed variations of its viewing angle requirement in a host of subsequent lawsuits, including this one. At the same time, DOJ has refused to commence a rulemaking to establish clear and specific guidelines for the placement of wheelchair seating locations in stadium-style movie theatres, despite NATO's formal petition in August 1999 that it do so. The result has been five years of continued uncertainty, during which each new litigation seems to generate a revised and inconsistent interpretation of Section 4.33.3, and each new theatre constructed – no matter what design is used – bears the risk that it will have to be retrofitted.

SUMMARY OF ARGUMENT

The majority opinion of the Ninth Circuit in this case raises two important issues of federal law that should be addressed by this Court pursuant to a writ of certiorari. First, the Ninth Circuit has interpreted Section 4.33.3 – an administrative rule established through notice and comment rulemaking – to include a viewing angle requirement neither found in the plain language of Section 4.33.3 nor intended to be included at the time of its

promulgation. The Ninth Circuit's interpretation of Section 4.33.3 is in direct and irreconcilable conflict with a prior holding of the Fifth Circuit on the very same issue. The effect of this new interpretation of Section 4.33.3 is to place thousands of motion picture auditoria out of compliance with the ADA, make it impossible for architects and theatre-design professionals to determine exactly what is required to comply with the ADA for current and future construction, and trigger an immediate retrofit obligation likely to cost hundreds of millions of dollars.

The second aspect of the Ninth Circuit's decision is just as troubling, and will have an even greater impact on both federal accessibility law under the ADA, and more generally, rulemaking under the Administrative Procedures Act ("APA"). The Ninth Circuit arrived at its interpretation of Section 4.33.3 by blindly deferring to DOJ's *post hoc* interpretation of that section to include requirements never intended at the time of its promulgation. In doing so, the Ninth Circuit has expressly approved the use of agency "interpretation" as a means of retroactively amending legislative rules, while avoiding the requirements of notice and comment rulemaking. The use of *post hoc* "interpretation" to change the meaning of an established rule undermines Congress's unequivocally expressed intent that clear and specific ADA standards for new construction be established through notice and comment rulemaking. Moreover, the retroactive amendment of a legislative rule without resort to rulemaking is inconsistent with the requirements of the APA and this Court's prior holdings.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit in this case is in direct and irreconcilable conflict with the Fifth Circuit's decision in *Lara* in two fundamental respects.[9] First, whereas the Fifth

9. On November 6, 2003, the Sixth Circuit issued a decision in *United States v. Cinemark USA, Inc.*, 2003 FED App. 0395P (6th Cir. November 6, 2003) that holds that the "comparable lines of sight" language in Section 4.33.3 requires a consideration of "viewing angles." Thus, there is presently a conflict among the Fifth, Sixth and Ninth (Cont'd)

Circuit held that the "comparable lines of sight" language in Section 4.33.3 addresses only the issue of view obstruction, the Ninth Circuit held that Section 4.33.3 also requires a consideration of the relative desirability of seat location as measured by viewing angles. Second, the Fifth Circuit held that DOJ could not reinterpret Section 4.33.3 or otherwise imbue it with a meaning not intended at the time of its promulgation unless it did so through the notice and comment rulemaking contemplated by the ADA itself. In contrast, the Ninth Circuit held that DOJ may reinterpret Section 4.33.3 to impose new requirements not contemplated when the regulation was promulgated, despite the fact that those new requirements were never articulated prior to the construction of the theatres at issue. Moreover, the Ninth Circuit also held that DOJ's new interpretation was entitled to judicial deference.

Both of these conflicts in the law are of critical importance to NATO's members because the Ninth Circuit's decision exposes the motion picture exhibition industry to the immediate and crushing financial liability of retrofitting thousands of existing stadium-style auditoria, leaves the industry with no practical guidance as to exactly what is required by Section 4.33.3 for future construction, and subjects theatre owners to unknowable future liabilities to retrofit whenever DOJ determines to reinterpret Section 4.33.3 or other ADA guidelines to include requirements not previously contemplated. As set forth more fully below, this Court should grant the writ of certiorari and resolve these important issues of federal law.

(Cont'd)

Circuits on the meaning of Section 4.33.3 and the deference to be accorded to DOJ's interpretation of Section 4.33.3 to include new requirements never intended at the time of its promulgation. The same issue is currently before the First Circuit, and the Second Circuit has recently remanded a case involving the same issues for further consideration by the District Court.

A. The Direct and Irreconcilable Conflict Among the Circuits Regarding the Requirements of Section 4.33.3 Places the Motion Picture Exhibition Industry in a Position of "Impossible Uncertainty" in Attempting to Comply With Section 4.33.3.

1. There is a Direct and Irreconcilable Conflict Among the Circuits Regarding the Meaning of Section 4.33.3.

The decision of the Ninth Circuit below is in direct conflict with the Fifth Circuit's holding in *Lara* regarding the meaning of Section 4.33.3. Based on its review of the plain language of Section 4.33.3, the history of its promulgation, and recent comments and actions by the Access Board, the Fifth Circuit held in *Lara* that the "comparable lines of sight" language in Section 4.33.3 was intended to address the issue of view obstruction and not relative viewing angles or other subjective viewer preferences. As a result, the Fifth Circuit found that wheelchair seating located amongst general public seating with an unobstructed view of the screen satisfies Section 4.33.3, as presently constituted.[10]

In contrast, the Ninth Circuit held that Section 4.33.3 requires the consideration of viewing angles, as well as view obstruction, and that viewing angles for wheelchair seating must be within the range of angles offered to the general public in stadium-style theatres.[11] Consequently, the same theatre design

10. The *Lara* Court did not suggest that Section 4.33.3 could not, or *should* not, be revised to incorporate additional requirements. The Fifth Circuit noted, however, that the only proper way to do so was through rulemaking designed to give all affected persons clear guidelines for complying with the ADA. *Lara*, 207 F.3d at 789.

11. As the dissenting opinion below authored by Judge Kleinfeld points out, however, the majority's interpretation of Section 4.33.3 places theatre owners in a position of "impossible uncertainty" because it provides no practical guidance to design professionals as to what they must do to comply with the law. Accordingly, as things now stand, at least in the Ninth Circuit, theatre owners must make subjective judgments regarding the relative desirability of viewing locations and hope that those judgments are consistent with the DOJ's current and future interpretations of Section 4.33.3.

that meets the purportedly uniform federal standard for accessibility in the Fifth Circuit must be retrofitted at great cost in the Ninth Circuit. In fact, even theatres built in the Fifth Circuit are at risk if the decision below is not overturned. The District Court for the Central District of California has indicated that its ruling that viewing angles must be considered under Section 4.33.3 will be applied to theatres located in the Fifth Circuit despite the holding of *Lara*. *See United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1114-15 (C.D. Cal. 2002). The real world effect of these two conflicting decisions is to leave theatre owners contemplating new construction in *any* jurisdiction in a quandary as to what is really required by Section 4.33.3.

2. The Conflicting Interpretations of Section 4.33.3 Make it Impossible for Theatre Owners to Ensure That Newly-Constructed Theatres Comply With the ADA.

The design and construction of a modern motion picture theatre is a complex and expensive process requiring the accommodation of a myriad of economic, aesthetic and legal constraints. Architects and other design professionals are required to consider and ensure compliance with all federal, state and local building codes, safety regulations and accessibility requirements prior to the commencement of construction. In most jurisdictions, ensuring compliance with applicable building codes prior to construction is a legal requirement. Theatre designs generally must be reviewed and approved by state and/or local authorities in order to obtain a permit that authorizes the start of construction. Ensuring pre-construction compliance with all applicable building codes is also a practical requirement because the costs of retrofitting a structure like a movie theatre after construction has been completed is generally orders of magnitude greater than ensuring compliance at the design stage.[12]

12. Even modest changes in the location of wheelchair seating in an existing theater can often require extensive other changes to the theater (Cont'd)

The same considerations apply to meeting federal accessibility requirements at the design stage, but to an even greater degree. While design professionals can ensure compliance with state and local building codes through the process of pre-approval of designs, ongoing inspections, binding guidance provided by local officials, and procedures for obtaining exemptions or variances, these mechanisms are not available at the federal level. There is no procedure for review and pre-approval of theatre designs with respect to compliance with federal ADA accessibility requirements. Theatre owners can gain no assurance of compliance through ongoing inspections and on-site guidance because federal officials do not perform those functions. Although DOJ does provide technical guidance via a telephone helpline, any such guidance is not binding on DOJ, and accordingly provides no protection from a future demand to retrofit. Finally, there is no established procedure for obtaining variances or exceptions from federal ADA accessibility requirements in unusual circumstances.

For all of these reasons, it is of paramount importance that federal ADA accessibility guidelines be sufficiently clear and specific to allow design professionals to know exactly what is required to comply with the ADA. Even a cursory review of the ADAAG demonstrates that the Access Board went to considerable length to promulgate accessibility guidelines that specify exactly what is required to comply with the law. As Judge Kleinfeld noted in his dissent below, the accessibility requirements surrounding Section 4.33.3 are written with great precision, providing guidance as to what is required to the inch and millimeter. Without that type of specificity and clarity, there is simply no way for theatre owners to be sure that a theatre complies with the ADA during the design stage, and thereby avoid the substantial and unnecessary costs of retrofitting newly constructed theatres.

(Cont'd)
in order to meet related requirements for safe ingress and egress for wheelchair-bound patrons.

The conflict among the Circuits regarding the meaning of Section 4.33.3 places theatre owners in an untenable position. There is at present no way for a theatre owner to ensure that new construction meets federal accessibility requirements – no matter how much the theatre owner may wish to do so. While the Fifth Circuit's interpretation of Section 4.33.3 to require an unobstructed view is a clear standard to which compliance can be reliably measured, theatre owners cannot be assured that ultimately it will not be overturned. On the other hand, attempting to comply with the Ninth Circuit standard is just as problematical. As pointed out by the dissent below, compliance with the ambiguous and largely subjective viewing angle requirement is difficult to measure. This is particularly so because movie theatres are built in a variety of shapes, sizes and configurations.

Just as troubling, the general subjective standard approved by the Ninth Circuit is by its nature open to the same kind of reinterpretation that has resulted in this litigation. Indeed, the interpretation of Section 4.33.3 upheld by the Ninth Circuit is different from variations of the viewing angle requirement advanced by DOJ in other cases. As noted in the Petition for Writ of Certiorari filed in this case, DOJ's interpretations have ranged from the purely quantitative requirement that vertical viewing angles not exceed 35° to a purely qualitative and subjective requirement that wheelchair seating provide "an optimal viewing zone." *See* Petition at 7-8, n.7. Perhaps more to the point, there appears to be no end to DOJ's practice of advancing diverse and constantly changing interpretations of Section 4.33.3. The motion picture industry simply cannot design and build theaters complying with the ADA so long as federal accessibility requirements remain a moving target.

The conflict in the law must be resolved as soon as possible. The motion picture exhibition industry cannot sit on the sidelines hoping the law will eventually sort itself out. The construction of new theatres is a business necessity. The costs of mothballing ongoing construction would be astronomical. The economic

impact of a moratorium on further construction would be even more expensive and disruptive. Perhaps more important, given the irreconcilable conflict among the Circuits, and DOJ's refusal to resolve the matter through rulemaking, there exists the real possibility that the uncertainty concerning what is required by Section 4.33.3 may not be resolved for years to come unless this Court does so now.

3. The Present Uncertainty in the Law Exposes the Motion Picture Theatre Industry to a Catastrophic Retrofit Burden for Both Existing and Newly-Constructed Theatres.

The motion picture exhibition industry has built thousands of stadium-style auditoria over the last eight years in reliance on the universal understanding of theatre design professionals that Section 4.33.3 was intended to ensure an unobstructed view of the screen. Theatre designers were not alone in their common understanding regarding what Section 4.33.3 was intended to require. The Access Board – the body that actually drafted Section 4.33.3 – has made clear, in connection with a recent rulemaking to revise the ADAAG, that a revision to Section 4.33.3 is necessary to add consideration of viewing angles as a requirement. It is telling that DOJ's own technical personnel held the same view prior to 1998, a view echoed by the Fifth Circuit in *Lara*. Indeed, even the majority opinion below acknowledges that "DOJ may not have been contemplating viewing-angle issues in the context of stadium-style seating at the time § 4.33.3 was promulgated."[13]

Despite the fact that thousands of existing stadium-style auditoria were built in compliance with the requirements of Section 4.33.3 as they existed at the time, the Ninth Circuit's

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13. The Department of Justice certified the Texas Accessibility Standards (a state version of the ADA) as being in compliance with the ADA. Subsequently, State of Texas inspectors certified, in writing, that various Cinemark theatres complied with the TAS based on their apparent understanding that Section 4.33.3 addressed view obstruction, not viewing angles.

decision below will require the retrofit of most, if not all, of them. The cost of retrofitting thousands of auditoria will be enormous. Modern motion picture theatre complexes generally have between 10-20 auditoria, all of which incorporate stadium-style seating. Stadium-style seats are situated on steep tiers of poured concrete or structural steel. Because the steep slope of the stadium section exceeds 5%, the aisles cannot be ramped to provide access for wheelchair bound patrons.

As a result, changing the location of wheelchair seating – particularly into the middle or back of the stadium section – will necessarily involve substantial demolition and reconstruction, including relocating the main access aisle, the installation of wheelchair lifts or elevators, and/or "doubleback" style ramping. While the exact cost of retrofitting each auditorium will vary with the design and configuration of each theatre, there can be no doubt that retrofitting theatres is exceedingly expensive. For example, a wheelchair lift and auxiliary equipment may have an installed cost of up to $50,000 per auditorium; installation of an elevator costs approximately $100,000 or more per auditorium. Relocating the access aisle or extensive "doubleback" reramping can be even more expensive. NATO estimates that there are approximately 10,000 existing stadium-style motion picture auditoria in the United States. Accordingly, the total cost of retrofit for the industry would likely run in the hundreds of millions of dollars.

B. The Ninth Circuit's Uncritical Deference to DOJ's Use of *Post Hoc* Interpretation as a Substitute for the Notice and Comment Rulemaking Required by the APA and ADA Undermines the Congressional Intent That Clear and Specific Guidelines Be Provided for the Construction of New Public Accommodations.

The Ninth Circuit's decision to impose a viewing angle requirement for the placement of wheelchair seating appears to be based largely, if not entirely, on its uncritical determination that it is required to defer to DOJ's *post hoc* interpretation of the requirements of Section 4.33.3. Although the majority

opinion did not review in detail the history of Section 4.33.3's promulgation, its subsequent application, or other evidence of its intended meaning at the time it was promulgated, the majority does acknowledge "the fact that DOJ may not have been contemplating viewing-angle issues in the context of stadium-style seating at the time when § 4.33.3 was promulgated." In other words, while conceding that the viewing angle requirement now advanced by DOJ was not contemplated at the time that Section 4.33.3 was promulgated, the majority defers to DOJ's retroactive application of the new requirement as if it had always been the law.

The Ninth Circuit's blind and uncritical deference to DOJ in this instance is inconsistent with both the requirements of the APA and this Court's prior holdings, and also undermines the express intent of Congress that clear and specific ADA standards for new construction be established through notice and comment rulemaking. In deferring to DOJ's use of interpretation rather than rulemaking to change the meaning of Section 4.33.3, the Ninth Circuit has placed its *imprimatur* on a practice that circumvents the requirements of the APA and the ADA, and invites agencies to promulgate vague and open-ended rules, and then inject those rules with meaning on an *ad hoc* basis.

However, judicial deference to an administrative agency's interpretation of its own regulations is not proper where that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). A court should not defer to an agency's interpretation of its own regulation "if an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso v. Blockbuster-Sony Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), *quoting*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 512 (1994). As the District Court below found, and the Ninth Circuit decision acknowledges, DOJ's *post hoc* interpretation of Standard 4.33.3 is inconsistent with the intent of the Access Board and DOJ at the time of its

promulgation, and, thus, deference to DOJ's position is not required. *See also Lara v. Cinemark USA, Inc.* 207 F.3d 783 (5th Cir. 2000); *Caruso v. Blockbuster-Sony Entertainment Center*, 193 F.3d 730, 736 (3d Cir. 1999).

Moreover, deference to DOJ's *post hoc* interpretations of Standard 4.33.3 would be exceedingly inappropriate in this case. DOJ's reinterpretation of Section 4.33.3 to require consideration of viewing angles in the placement of wheelchair seating in newly constructed stadium-style movie theatres effects a substantive change to a legislative rule previously established through notice and comment rulemaking. But, "an agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." *Caruso v. Blockbuster-Sony Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), *citing* I., Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 6.10 at 283 (1994). Legislative rules like Standard 4.33.3 can be modified only by notice and comment rulemaking in compliance with the APA.

In *Caruso v. Blockbuster-Sony*, *supra*, the Third Circuit found that DOJ's attempt to interpret Section 4.33.3 to require an unobstructed view over standing spectators to be tantamount to an attempt to amend Section 4.33.3 without the notice and public comment required by the APA. *Id.* at 736-37. The Court noted that DOJ could adopt a new substantive regulation requiring that wheelchair users be given lines of sight equivalent to standing patrons, but to do so it had to proceed with notice and comment rulemaking. *Id.* at 737. The District Court in *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 736-42 (D. Ore. 1997) reached the same conclusion after an exhaustive analysis of the history of the promulgation of Section 4.33.3.[14]

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14. In *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), the D.C. Circuit also rejected DOJ's contention that it could reinterpret its regulations without going through the process

(Cont'd)

During the promulgation of Section 4.33.3, DOJ never gave notice to the public that consideration of viewing angles was to be a requirement for new construction or set forth the basis and purpose of such a requirement pursuant to 5 U.S.C. §§ 553(b) and (c). Accordingly, even if DOJ *had* subjectively intended Section 4.33.3 to address viewing angles when it was promulgated, that interpretation would not be an enforceable regulation under the APA. *See Independent Living Resources v. Oregon Arena Corp., supra* at 740-41.

The majority opinion below suggests that, by refusing to expand the meaning of Section 4.33.3 to include consideration of viewing angles, the District Court denied wheelchair – bound patrons the "equal enjoyment" promised by the ADA. But far from undermining the goals of the ADA, the District Court's refusal to stretch Section 4.33.3 beyond its original meaning is exactly what Congress intended. Recognizing the complexity and expense often involved in ensuring that new construction complies with ADA accessibility requirements, Congress mandated that clear guidelines be established to provide owners and operators of public accommodations notice of exactly what is required of them. As the *Lara* court noted:

> Congress granted DOJ, in conjunction with the Access Board, the authority to promulgate regulations under the ADA in order to provide the owners and operators of places of public accommodation with clear guidelines for accommodating disabled patrons. *See generally*

(Cont'd)

of notice and comment rulemaking. *Id.* at 586. The *Paralyzed Veterans* Court held, however, that the evidence submitted at trial did not quite establish that DOJ's interpretation of Section 4.33.3 to require sightlines over standing spectators was contrary to its original intent in adopting Section 4.33.3. *Id.* at 587. Both the *Caruso* and *Independent Living* Courts declined to follow the *Paralyzed Veterans* decision, finding there was sufficient evidence that DOJ had changed its position on whether Section 4.33.3 requires sightlines over standing spectators.

> House Report No. 101-485 (I) at 124-25, 138-39 (1990), reprinted in 1990 U.S.C. Can 407-08, 421-22.

Lara v. Cinemark USA, Inc., 207 F.3d at 789.

Moreover, Congress required that accessibility requirements for new construction be clearly articulated in regulations duly promulgated under the APA in a manner that ensures that all points of view are heard. As the trial court in *Caruso v. Blockbuster-Sony* observed:

> Congress has elected to pass a very general statute and leave it to the regulatory process to fill in the necessary details. Constructing a stadium or arena is an expensive, complex affair. If the law is to impose requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations. Compliance with APA rulemaking ensures, hopefully at least, that all points of view are heard and that the resulting regulations provide concrete guidance to those embarking on such a project.

Caruso v. Blockbuster-Sony Music Entertainment Center, 968 F. Supp 210, 216 (D. N.J. 1997), *aff'd in part, rev'd in part*, 193 F.3d 730 (3d Cir. 1999). *See also Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp 698, 736, n.55 (D. Oregon 1997) ("the notice and comment requirement would be eviscerated if the [DOJ] could create new obligations simply by announcing a new interpretation of an existing regulation").

The ruling of the District Court in this case, as well as the Fifth Circuit's decision in *Lara*, does not limit the substantive rights of disabled patrons under the ADA, they merely require DOJ to promulgate clear regulations after notice and public comment as Congress intended. The issues involved in the location of wheelchair seating in stadium-style theatres could and should have been addressed in a notice and comment

rulemaking long ago. The issues raised by the location of wheelchair seating in stadium-style movie theatres have been well-recognized since the mid-1990s, and NATO even formally requested DOJ to commence a rulemaking proceeding for the placement of wheelchair seating in stadium-style theatres in 1999. If the disabled are, in fact, being denied the "equal enjoyment" promised by the ADA, it is because DOJ has failed in its statutory obligation to provide clear guidelines through notice and comment rulemaking.

The effect of the Ninth Circuit's decision in this case is to completely undermine the certainty and specificity of the new construction guidelines required by Congress in the ADA. If DOJ can effect a retroactive change to the requirements of Section 4.33.3 through the expedience of "interpretation" in this case, then it can do so again in the future with respect to Section 4.33.3 or any other ADA requirement. If DOJ is free to change the rules at will, without notice and with retroactive application, there is simply no way for public accommodations to ensure that ADA requirements have been met and that expensive retrofit liabilities can be avoided.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PETITION FOR RULEMAKING DATED AUGUST 24, 1999

THE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
DISABILITY RIGHTS SECTION

In the Matter of

NATIONAL ASSOCIATION OF THEATRE OWNERS,

Petitioner.

Petition for Rulemaking
Re: Stadium-Style Motion Picture Theatres
Docket No. _____

Pursuant to 5 U.S.C. § 553(e), the National Association of Theatre Owners ("NATO") respectfully petitions the Department of Justice ("Department") to promulgate a lawful rule for the placement of wheelchair spaces in "stadium style" motion picture theatre auditoriums which conforms to the requirements of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq.* ("ADA") . Under 5 U.S.C. § 553(b) and (c), issuance of the rule requested herein must be preceded by, *inter alia*: (1) adequate notice of the proposed rule published in the Federal Register and (2) the opportunity for interested persons, such as NATO, to "participate in the rule making through submission of written data, views, or arguments. . . ."

Appendix A

Stadium style motion picture theatres are intended to enhance the movie viewing experience by providing seating on tiered risers. Stadium-style motion picture theatres are a recent but especially popular trend because they offer all patrons an unobstructed view of the screen. In exchange, a substantial portion, if not all, of the theatre auditorium is characterized by chairs located on continuous risers that vary from 2 inches to 18 inches in height, depending on the design of the theatre. To reach the seats within such an auditorium, patrons have to climb stairs rather than walk up sloped aisles typical of older theatres. This situation presents obvious difficulties for wheelchair locations. In order to fulfill the objectives of the stadium-style design in a manner consistent with the requirements of Title III, several factors must be analyzed and considered. The objectives of the ADA must be synthesized with the practical and safety limitations inherent in the nature of this type of seating arrangement.

The rulemaking requested herein is called for because neither the ADA nor the regulations promulgated thereunder specify the location in which wheelchair spaces must be placed in stadium style motion picture theatre auditoriums. Stadium-style seating was not common in theatres when the ADA and the regulations were under consideration and location of wheelchair seating in such theatres was not addressed by the Congress or any of the parties involved in the development of ADA regulations. Before the Department adopts, advocates and seeks to enforce a position regarding the placement of such wheelchair spaces, it must permit the issue to be appropriately reviewed, considered, analyzed and otherwise "vetted" through the notice-and-comment

procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

In derogation of this requirement, the Department has already adopted and is attempting to enforce one or more rules which require operators of stadium style movie auditoriums to locate wheelchair spaces in areas that provide the patron with: 1) a "vertical viewing angle" that is equal to or less than the ***median*** vertical viewing angle for all of the seats in the auditorium (hereafter, "Median Vertical Viewing Angle Rule"; 2) a "horizontal viewing angle" that is equal to or better than the ***median*** horizontal viewing angle for all of the seats in the auditorium (hereafter, "Median Horizontal Viewing Angle Rule"; or (3) both. Neither the Median Vertical Viewing Angle Rule nor the Median Horizontal Viewing Angle Rule is set forth in the ADA or the regulations duly promulgated thereunder. The Median Vertical Viewing Angle Rule is based, at least in part, on a purported industry "guideline" which predated stadium style seating in theatres, represents lofty objectives rather than actual practice, and was not subject to the review and scrutiny of the notice and comment procedures under the APA. Petitioner respectfully submits it is incumbent upon the Department to void its improperly adopted Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule and to replace them with a rule lawfully promulgated in compliance with the APA's prior-notice-and-comment requirements.

Appendix A

I. BACKGROUND

Petitioner NATO

Headquartered in North Hollywood, California, NATO is the national trade organization of the motion picture theatre industry. NATO is the largest trade association of motion picture theatres in the world, and its members currently operate over 19,000 motion picture screens located in all of the 50 states. A list of current NATO members is provided in Exhibit A hereto. Many NATO members currently operate stadium style movie theatres and/or are in the process of constructing such theatres. NATO members have sought in good faith to comply fully with the requirements of Title III in designing and constructing the stadium style auditoriums. However, they have been faced with conclusory, vague, untested, unfounded, unsubstantiated, confusing and inconsistent pronouncements, indications and statements of position by the Department, the courts and various advocacy rights groups throughout the country regarding the appropriate placement of wheelchair locations in stadium style auditoria. Several NATO members currently face actual or threatened private and government lawsuits and investigations challenging the wheelchair seating in their existing or proposed stadium style theatres. This patchwork of enforcement efforts is leading to an array of inconsistent interpretations and pronouncements by courts regarding the application of Title III to stadium style seating arrangements.

NATO has standing to pursue this Petition on behalf of its members because (1) its members would otherwise have sanding in their own right; (2) the interests which NATO

seeks to protect are germane to the purpose of NATO; and (3) the Department can provide the relief requested by NATO without requiring the participation of individual members of NATO.

Promulgation of the ADAAG

In enacting Title III of the ADA, Congress specifically designated the Attorney General and the United States Architectural and Transportation Barriers Compliance Board ("Access Board")[1] to promulgate the standards to be used in administering and enforcing Title III. Section 12186(b), 42 U.S.C., provides that "[n]ot later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of" Title III, including "standards applicable to [public accommodation] facilities. . . ." Congress also mandated that the Access Board issue minimum guidelines to implement Title III of the ADA. 42 U.S.C. § 12204.

In accordance with the ADA, the Access Board issued the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). See 56 Fed. Reg. 35,408 (1991) (codified at 36 C.F.R. pt. 1191 (App. A). The Access Board promulgated its guidelines in accordance with APA notice-and-comment procedures. On the same day that the ADAAG was issued,

1. Originally, Congress created the Access Board to insure compliance with the Architectural Barriers Act of 1968, 42 U.S.C. § 4151, which governed accessibility to federally funded buildings. *See* 29 U.S.C. § 792. In 1992, Congress amended 29 U.S.C. § 792 to include an additional function for the Access Board – develop advisory guidelines for Titles II and III of the ADA. See 29 U.S.C. § 792(b)(2).

the Department adopted the ADAAG as its own regulations, entitled the Justice Department's Standards for Accessible Design ("JDSAD") (codified at 28 C.F.R. pt. 36 App. A).

ADAAG Standard 4.33.3

The ADAAG predated the advent of stadium style movie theatres. Accordingly, it contains no specific rule or guidance as to the location of wheelchair spaces in such theatres. Under "Standard 4.33.3" of the ADAAG, in auditoriums of less than 301 seats, or auditoriums of any size having sight lines that require slopes of greater than 5 percent, wheelchair seating may be "clustered" in a single location of the theatre. 28 C.F.R. Ch. I, Pt. 36, App. A, § 4.33.3. Where a single "cluster" of wheelchair seats is permitted, the regulations do not specify a precise location where builders must place the single cluster of seats, other than that they must adjoin an accessible route of egress. Standard 4.33.3 states, in pertinent part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. . . . When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location.

Appendix A

> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

When Standard 4.33.3 was adopted motion picture theatres had sloped floors, one ticket price, and there were no reserved seats. In movie auditoria of under 301 seats, wheelchair locations could be placed in one location. The industry believed that the term "lines of sight" related to the ability of a patron to see over the head of the person in the rows in front.

Standard 4.33.3, like the ADA itself, makes no reference to a "vertical viewing angle" or a "horizontal viewing angle." It certainly does not purport to prescribe the maximum vertical or horizontal viewing angle that may be offered to wheelchair users in movie theatres. There also is no requirement set forth in Standard 4.33.3 that wheelchair locations receive a vertical or horizontal viewing angle that is equal to or less than the "median" viewing angle for all patrons in the auditorium. Nor is there evidence that either the Department or the Access Board intended that Standard 4.33.3 impose a maximum vertical or horizontal viewing angle requirement for movie theatres. Indeed, the requirement that wheelchair users receive "a choice of admission prices and lines of sight comparable to those for members of the general public" appears to have been aimed not at small movie theatres, but rather at large venues such as sports

stadiums and concert halls which have multiple ticket prices and reserved seats.[2]

The Median Vertical Viewing Angle Rule

Prior to the Summer of 1998, the Department had interpreted Section 4.33.3 in the context of movie theatres but had never required wheelchair seating positions to be located in a particular location of an auditorium to comply with the law. To the contrary, the Department had assured theatre owners and industry groups that, in theatres of 300 seats or less, wheelchair seating areas could permissibly be placed anywhere in the theatre under Section 4.33.3.

However, in July 1998, the Department filed an *amicus curaie* brief in an ADA action pending in El Paso, Texas which reflected an entirely new position by the Department that cannot be found in the language of the ADA or Standard 4.33.3. In its brief in *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex. July 20, 1998), the Department pronounced that "in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats ***within the range of viewing angles as those offered to most of the general public*** in the stadium style seats, adjusted for seat tilt." Brief, at 8 (emphasis added). The Department subsequently clarified its position to require, at a minimum,

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2. For example, if a baseball park offers seats (1) behind home plate, (2) behind first base, (3) behind third base, (4) at a "club" level and (5) around the outfield, the requirement that wheelchair receive "a choice of admission prices and lines of sight comparable to those for members of the general public" insures that the wheelchair users will be offered seating in multiple locations.

that wheelchair placements in stadium style theatres provide such viewers a vertical "viewing angle" to the screen that is at least as good as the "median" viewing angles in the auditorium.

The Department bases its Median Vertical Viewing Angle Rule at least in part, on a purported industry "guideline" which was not prepared with stadium style seating in mind, and which has never been subjected to analysis or scrutiny under the APA. In its *amicus* brief in *Lara*, the Department specifically pointed to the "SMPTE Engineering Guideline Design of Effective Cine Theaters, EG 18-1994" ("SMPTE Guideline"). The SMPTE Guideline was initially issued by the Society of Motion Picture and Television Engineers ("SMPTE") in the 1970s, well before the first stadium style motion picture theatre was in operation. Brief, at 3-4. In its brief, the Department cited, *inter alia*, the following as conclusions in the SEMPTE Guideline:

- "physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds +35 degrees";

- "[p]hysical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction";

- "the 'optimum viewing zone' is from horizontal at eye level (0 degrees) to -30 degrees"; and

- "to avoid excessive vertical viewing angles and to bring the vertical angle closer to zero degrees, seat backs should be tilted the same amount, 12 to 15 degrees."

These "conclusions" were never subjected to the prior-notice-and-comment procedures of the APA.

The Median "Horizontal Viewing Angle" Rule

In addition to applying the Median Vertical Viewing Angle rule, the Department also has taken the position that wheelchair placements in stadium style theatres must provide a "horizontal viewing angle" which is equal to or better than the median "horizontal viewing angle" in the auditorium. Petitioner is not aware of any purported basis upon which the Department has relied in developing and applying this Rule.

The ADAAG Manual

In May of this year, the Access Board issued an "ADAAG Manual" which it refers to as a "guide to the Americans with Disabilities Act Accessibility Guidelines." The ADAAG Manual states that in construing and applying Section 4.33.3, "[s]ight lines are calculated according to certain industry conventions and practices." Manual, at 117. Moreover, the Manual contains a diagram of four recommended audience wheelchair placements for a public auditorium. Manual, at 118. Only one of the four placements recommended by the Access Board would comply with the Department's Median Vertical Viewing Angle Rule or Median Horizontal Viewing Angle Rule.

Appendix A

II. A NOTICE AND COMMENT RULEMAKING IS REQUIRED

The Department's Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule constitute "rules" under the APA; therefore, prior notice and an opportunity for comment by the public were a prerequisite to the adoption of each such rule. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). A rule promulgated by an agency that is subject to the APA is invalid unless the agency first issues a public notice of proposed rulemaking which describes the substance of the proposed rule, and gives the public the opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule the agency must set forth the basis and purpose of the rule in a public statement. 5 U.S.C.§§ 553(b), (c). Public participation in rule-making is necessary to "allow the agency to benefit from the experience and input of the parties," *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); and to "enable[] the agency . . . to educate itself before establishing rules and procedures which have a substantial impact on those regulated," *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3rd Cir. 1969).

Although the APA's procedural requirements apply to "legislative" (or "substantive") rules and not to "interpretive rules," the determination of the maximum allowable vertical viewing angle for wheelchair placements in movie theatres certainly qualifies as a "legislative" rule. In its recent opinion

in *Caruso v. Blockbuster-Sony*, *supra*, the Third Circuit found that the Department had improperly engaged in legislative rulemaking in connection with its efforts to apply Standard 4.33.3 to the issue of whether wheelchair users are entitled to an unobstructed view over standing spectators. The court emphasized that if the Department believed "that the ADA should be interpreted to require that wheelchair users be given lines of sight equivalent to standing patrons . . . the [Department] can accomplish this end through notice-and-comment rulemaking." 1999 WL 185040 *9. As the trial court in Caruso explained:

> Congress has elected to pass a very general statute and leave it to the regulatory process to fill in the necessary details. Constructing a stadium or arena is an expensive, complex affair. If the law is to impose requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations. Compliance with APA rulemaking insures, hopefully at least, that all points of view are heard and that the resulting regulation provides concrete guidance to those embarking on such a Project.[3]

Stadium style seating movie theatres are also expensive and complex facilities and it is essential that all requirements for the construction of such facilities "be clearly articulated in

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3. *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 968 F. Supp. 210, 216 (D.N.J. 1997), *aff'd in part, rev'd in part*, __ F.3d __, 1999 W 185040 (3rd Cir. April 6, 1999).

. . . regulations" duly promulgated under the APA in a manner that insures that "all points of view are heard. . . ." *See also Independent Living Resources*, *supra*, 982 F. Supp. at 736 n. 55 ("the notice and comment requirement would be eviscerated if the [Department of Justice] could create new obligations simply by announcing a new interpretation of an existing regulation").

That prescription of a specific vertical or horizontal viewing angle for wheelchair placements constitutes legislative rulemaking is demonstrated by the opinion by Judge Posner in *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996). In *Hoctor* the Department of Agriculture was tasked with enforcing the Animal Welfare Act, 7 U.S.C §§ 2131 *et seq.*, with respect to the keeping of exotic animals. The Act was silent as to the height requirement for fences used to house such animals. Following notice and comment, the Department promulgated a regulation entitled "structural strength." This regulation required facilities housing such animals to be "constructed of such material and of such strength as appropriate for the animals involved" and to be "structurally sound." 9 C.F.R. § 3.125(a). However, as with the statute, the regulation contained no express requirement that perimeter fences be a particular height. Nevertheless, the Department issued and enforced an internal memorandum which provided that all dangerous animals must be inside a perimeter fence at least 8 feet high.

The Seventh Circuit held that the "internal memorandum" constituted a legislative rule which required notice and comment to be effective. The court stated: "Even if . . .

the eight-foot rule is consistent with, even in some sense authorized by, the structural-strength regulation, it would not necessarily follow that it is an interpretive rule. *Id.* at 170. The court explained that in order to be an interpretive rule, a rule must be "derived from the regulation by a process reasonably described as interpretation." *Id.* The court classified the 8-foot rule as "arbitrary" (not in the "arbitrary or capricious" sense) but because it represented "an arbitrary choice among methods of implementation." The court emphasized that:

> ***A rule that turns on a number is likely to be arbitrary in this sense.*** There is no way to reason an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or nine-foot fence or a ten-foot fence. None of these candidates for a rule is uniquely appropriate to, and in that sense derivable from, the duty of secure containment. This point becomes even clearer if we note that the eight-foot rule actually has another component – the fence must be at least three feet from any animal's pen. Why three feet? Why not four? Or two?

Id. (emphasis added). The court further stated that "[w]hen agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes." *Id.* at 170-71. The court also stated that the rule was "arbitrary in the sense that it could well be different without significant impairment of any regulatory

purpose." *Id.* at 171; *see also Carlisle Tire & Rubber Co. v. United States*, 634 F. Supp. 419, 423 (CIT 1986) (Department of Commerce engaged in legislative rulemaking by adopting a position that antidumping margins of 0.5% or less were "de minimis").

Judge Posner's opinion in *Hoctor* succinctly demonstrates *why* the Department's Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule constitute legislative rulemaking. To require movie theatres to provide wheelchair placements with viewing angles the same or less than the median vertical or horizontal viewing angle represents an arbitrary choice among methods of implementing the "lines of sight comparable" requirement of Standard 4.33.3. As with the 8-foot perimeter rule in *Hoctor*, the Department's rule is "arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose." Why is the rule based on the "median" average rather than the "mean" average? How does one properly measure vertical and horizontal viewing angles in the context of a motion picture theatre? There is a significant question as to whether a vertical and horizontal viewing angle test, as defined by the Department of Justice, is the appropriate way to measure line of sight in a movie theatre. In short, there are several factors to consider in determining whether a particular "line of sight" is "comparable." It was clearly arbitrary for the Department to determine that comparability of lines of sight must be achieved through a vertical and/or horizontal viewing angle based on the median viewing angle.

Appendix A

In *Hoctor*, the Agriculture Department's enforcement of an internal policy adopted without notice and comment caused "some unknown fraction" of the thousands of animal dealers in the U.S. to "face the prospect of having to tear down their existing fences and build new, higher ones at great cost." 82 F.3d at 171. The agency was admonished to "listen to" the concerns of such dealers "before settling on a final rule" which imposed a perimeter fence height requirement. Similarly here, there are hundreds of movie theatres across the country whose operators now face the prospect of having to redesign existing theatres at great cost. The Department should not be permitted to impose a specific vertical or horizontal viewing angle requirement for wheelchair placements in movie theatres until after the Department has "listened to" the concerns of such operators.

This is especially true given that the Department's new "Median Vertical Viewing Angle Rule" and "Median Horizontal Viewing Angle Rule" are inconsistent with the Department's prior pronouncements. Until its amicus brief in *Lara*, the Department had maintained that wheelchair seating in theatres of 301 seats or less could be anywhere in the general seating requirement of the auditorium, as long as the patron's view was not obstructed. The Department also had taken the position that wheelchair locations near entranceways were ideal, especially in auditoriums of any size having sight lines that require slopes of greater than 5 percent, as provided in the plain language of section 4.33.3.

Prior notice and comment is especially necessary here because of the Department's reliance upon the SMPTE Guideline for its position that vertical viewing angles should

not exceed 35 degree. The SMPTE Guideline does not purport to portray custom in the movie theatre industry - but rather, a lofty objective. ("Good design has often been compromised by practical solutions and the belief that effective cinemas are not economically feasible"). Moreover, such a study should be subjected to the scrutiny of the notice and comment process.

"An agency's denial of a fair opportunity to comment on a key study may fatally taint the agency's decisional process." *National Association of Regulatory Utility Commissioners v. FERC*, 737 F.2d 1005 (1984), *cert. denied*, 469 U.S. 1227 (1985) (agency's denial of fair opportunity to comment on a key staff study may fatally taint the agency's decisional process); *United States Lines, Inc. v. FMC*, 584 F.2d 519, 534 (D.C. Cir. 1978) ("we have required information in agency files or reports identified by the agency as relevant to the proceeding to be disclosed to the parties for adversarial comment. . . . Such requirements . . . ensure that parties to agency proceedings are afforded the opportunities guaranteed by statute meaningfully to participate in those proceedings. . . .") . In *Idaho Farm Bureau, Federation v. Babbitt*, 58 F.3d 1392, 1403-04 (9th Cir. 1995), the Fish and Wildlife Service violated the APA by relying extensively on a provisional report not subjected to public notice and comment. The court stressed that the "necessity for notice and opportunity to comment on the USGS study was greatly heightened because [the agency] relied largely on the USGS study to support its final rule," and that "[o]pportunity for public comment is particularly crucial when the accuracy of important material in the record is in question." *Id.* at 1403.

Finally, the need for a formal rulemaking is further mandated by the fact that the Department's Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule are contrary to the Access Board's "ADAAG Manual." Although the Manual states that "industry conventions and practices" should be looked to in complying with Section 4.33.3, there is no indication that the Department has done so in adopting and enforcing its rules. In addition, the Manual recommends wheelchair placements for public auditoriums which almost uniformly would fail to meet the requirements of the Department's rules. Such inconsistencies with the pronouncements of the Access Board further demonstrate why the Department needs to subject its rules for wheelchair placements in stadium style movie theatres to the notice and comment procedures mandated by the APA.

III. CONCLUSION

For the reasons set forth above, Petitioner NATO, on behalf of its members, respectfully requests that the Department replace its improperly adopted Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule with a new, lawful rule regarding the placement of wheelchair spaces in stadium style seating auditoriums promulgated in compliance with the prior-notice-and-comment requirements of the APA. Attached hereto as Exhibit B, is a proposed rule that NATO believes effectively meets the requirements of the ADA.

Appendix A

Respectfully submitted,

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Dated: August 24, 1999

APPENDIX B — LETTER FROM BILL LANN LEE TO STEVEN JOHN FELLMAN, ESQ. DATED APRIL 3, 2000

U. S. Department of justice

Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

Steven John Fellman, Esq.
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Washington, D.C. 20007-4492

Dear Sirs:

The Attorney General has asked me to respond to your petition on behalf of the National Association of Theatre Owners (NATO). NATO is requesting that the Department of Justice promulgate a rule for the placement of wheelchair spaces in "stadium style" motion picture theater auditoriums.

In support of its petition, NATO provided a lengthy memorandum that reiterates the arguments now being made by individual NATO members who are involved in litigation with the Department of Justice. The Department's response to these arguments will be made in the appropriate judicial forums.

Appendix B

However, regardless of the outcome of the pending litigation, the Department is planning to review and amend the Americans with Disabilities Act (ADA) regulations in the next year. As you know, the Architectural and Transportation Barriers Compliance Board (Access Board) has completed a comprehensive review of its ADA Accessibility Guidelines (ADAAG) and has published a Notice of Proposed Rulemaking (NPRM) to update and amend the guidelines. Section 306 of the ADA requires the Attorney General to promulgate regulations that are consistent with the Access Board's minimum guidelines. Consequently, the Department of Justice will issue a NPRM this year proposing to update its ADA Standards for Accessible Design in order to maintain the Standards' consistency with ADAAG. At the same time, the Department will review its title III regulation to clarify a variety of issues. In response to your petition, the Department will consider further clarification of the assembly area seating requirements at that time.

In the meantime, I have shared a copy of your petition for rulemaking with the Access Board so that the Board may incorporate your comments into its rulemaking record.

Sincerely,

s/ Bill Lann Lee
Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

Supreme Court, U.S.
FILED
DEC 1 - 2003
OFFICE OF THE CLERK

No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF CINEMARK USA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Cinemark USA, Inc. submits this brief as *amicus curiae* in support of Petitioners Regal Cinemas, Inc. and Eastgate Theatre, Inc. (collectively "Regal").[2] Cinemark's interest in this matter derives from its status as a builder and operator of places of public accommodation, and as a litigant in related cases in which the United States Department of Justice participated successively as *amicus curiae*, defendant, and plaintiff.[3] The cases of *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), *United States v. Cinemark USA, Inc.*, No. 02-3100, 2003 WL 22508500 (6th Cir. Nov. 6, 2003), and *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), comprise the present federal circuit conflict concerning interpretation of federal construction standards relating to wheelchair seating locations in small assembly areas.[4] The intervening case of *Cinemark USA, Inc. v. United States Department of Justice*,

1. Counsel for *amicus curiae* discloses that this brief was authored by Laura M. Franze and M. Brett Burns. Ms. Franze has been *amicus curiae's* counsel of record throughout all stages of the *Lara v. Cinemark USA, Inc.*, *Cinemark USA, Inc. v. United States Department of Justice*, and *United States v. Cinemark USA, Inc.* cases. *Amicus curiae* also discloses that Ms. Franze and Mr. Burns represent Petitioner Regal Cinemas, Inc., a wholly unrelated corporate entity, in the underlying petition for writ of certiorari, and served as its counsel of record in the courts below. Counsel for *amicus curiae* certifies that no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. This disclosure is made pursuant to Supreme Court Rule 37.6.

2. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus curiae* certifies that all parties have consented to the filing of this brief, and consent letters evidencing the parties' agreement have been filed with the Court.

3. Cinemark, like Regal, is a motion picture exhibitor. Cinemark operates 2,237 movie screens in 33 states.

4. These cases also highlight and exacerbate conflict and confusion in the circuits on judicial deference standards to agency interpretations of regulations, and due process implications of retroactive remedies where interpretations create new obligations, as discussed in Section B of this Brief, *infra*.

No. 3:99 CV 0183M, 2000 WL 915091 (N.D. Tex. July 6, 2000), concerns Cinemark's attempts to seek review under the Administrative Procedure Act of the DOJ's "rulemaking through litigation" strategy against the movie theater industry.

As a Texas-based company, Cinemark can provide the Court with detailed information concerning the DOJ's certification of the Texas Accessibility Standards as "meeting or exceeding federal accessibility standards" under the DOJ's state-code certification program, as well as the DOJ's public pronouncements that building in reliance on state accessibility approvals issued under DOJ-certified codes (such as the Texas Accessibility Standards) would "ensure that . . . the requirements of the ADA [were met]," "allow builders to be assured of compliance through inspections early in the construction process," and provide builders with "additional legal protection in ADA lawsuits." App. 1a-2a.[5]

Cinemark's plans to build and acquire additional movie theaters also give rise to an interest in the legal issues presented by Regal. The current uncertainty as to what construction designs are lawful chills those plans. Moreover, Cinemark has a substantial interest in avoiding punitive retrofitting costs for movie theaters that, to the knowledge of Cinemark, as well as the numerous state inspectors who issued accessibility approvals to Cinemark under the DOJ's own state code certification program, were built in full compliance with all applicable legal standards. Cinemark's interactions with the DOJ, including the

5. As explained below, TAS was certified by the DOJ as "meeting or exceeding" federal accessibility standards on September 23, 1996, and publicly promoted by the DOJ as a mechanism upon which builders could rely to construct public accommodations lawfully. App. 3a. Cinemark relied upon these state and local approvals of its compliance with TAS, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building stadium-style movie theaters in Texas and across the United States. Cinemark's first stadium-style theaters were constructed in Texas, and more Cinemark movie theaters are located in Texas than in any other state. *See infra*.

agency's consistent resistance to discovery concerning the basis for its rulemaking, as well as its concerted efforts to avoid judicial review under the APA, also provide important background information relating to the issues presented in Regal's Petition.

PRELIMINARY FACTUAL BACKGROUND

The collective experiences of Cinemark and Regal with the DOJ illustrate how a government agency has imposed new substantive legal obligations on an industry without regard to due process of law. By claiming application of judicial deference doctrines to after-the-fact "interpretations" and "reinterpretations" of a federal construction regulation in litigation, the DOJ has effectively bound the public, while itself remaining free to continue to "reinterpret" the law again. Moreover, by cynically asserting inconsistent legal positions in parallel lawsuits, the agency has avoided any inquiry into how, when, at what agency level, and on what factual basis its new rule was developed.

Between 1995 and 1999, Cinemark, along with other movie theater companies, responded to the market demand for stadium-style movie theaters by building more than 70 stadium-style movie theater multiplexes across the nation. Twenty-five multiplexes were constructed in Cinemark's home state of Texas, where public accommodations are subject to both federal accessibility requirements under Title III of the ADA and the ADAAG, as well as state accessibility requirements under the DOJ-certified TAS.[6] At the time of certification, the DOJ publicly encouraged all builders in the State of Texas to rely upon state and local approvals of their compliance with TAS

6. TAS closely follows the ADAAG and contains, among other things, a "Section 4.33.3" entitled "Placement of Wheelchair Locations" that is modeled after ADAAG predecessor American National Standards Institute ("ANSI") guidelines, and which uses the same term "lines of sight comparable" found in ADAAG. Section 4.33.3 of ADAAG is also entitled "Placement of Wheelchair Locations." *Compare* ADAAG § 4.33.3 (requiring "lines of sight comparable to those for members of the general public") *with* TAS § 4.33.3 (requiring "lines of sight comparable to those for other members of the audience").

and other DOJ-approved codes, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building public facilities. On its website, the DOJ described the importance of certification as follows:

> Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act. . . . "*Everyone in the State of Texas — builders, architects, business owners, and the general public — will benefit from Texas's new accessibility standards*" . . . . "*Certification makes it easy to comply with the law.*" . . . Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

App. 1a. In "Certification of State and Local Building Codes," another publication from the DOJ's website, the DOJ stated as follows:

> Code certification facilitates voluntary compliance [with Title III of the ADA] by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a

> significant role in enforcing the substance of the ADA.

App. 2a. Cinemark relied upon these DOJ representations, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building stadium-style movie theaters in Texas and across the United States.

On or about February of 1998, the DOJ informed Cinemark that it planned to investigate Cinemark's compliance with the "lines of sight comparable" clause contained in Section 4.33.3 of ADAAG. Prior to this time, the DOJ had consistently taken the position that wheelchair locations could be situated anywhere within the footprint of small venues (with 300 or fewer seats) where dispersal of seating was not required, and had never even intimated that a "viewing angle" requirement existed concerning wheelchair seating locations. App. 4a-6a.[7] Perplexed Cinemark officials immediately requested a meeting to discuss the DOJ's concerns. In response to specific requests for assistance regarding both existing theaters and prospective construction, DOJ representatives conceded that the agency had taken no position on the issue of whether Section 4.33.3 required consideration of "viewing angles," required wheelchair seating locations to be placed a specified distance from the movie screen,

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7. Until this time, all DOJ pronouncements concerning "lines of sight" focused solely on proving unobstructed views. *See Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 736-37 (3d Cir. 1999) (Section 4.33.3 did not address issue of lines of sight over standing spectator, and DOJ's interpretation requiring unobstructed lines of sight over standing spectators, as set forth in Technical Assistance Manual, not entitled to deference); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997) ("We think the language 'lines of sight comparable' quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without any obstruction."); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (Section 4.33.3 "does not purport to decide whether lines of sight over standing spectators are — or are not — necessary in order to comply with the ADA").

or even required particular "sight lines" in movie theaters with less than 300 seats where dispersal of wheelchair seating locations was not required. App. 4a-6a.

Despite these representations, in July of 1998, after the close of discovery and on the eve of summary judgment deadlines, the DOJ moved for leave to appear as *amicus curiae* in a private plaintiff lawsuit styled *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex.), and asserted that it "interpreted" Section 4.33.3 of ADAAG to require compliance with a "viewing angle" requirement, even in small venues. The DOJ defined this requirement as requiring wheelchair seating locations in stadium-style movie theaters to provide lines of sight within the "range" of viewing angles offered to "most" of the general public, adjusted for tilt, from tiered stadium-style seats, and further opined that any viewing angle in excess of thirty-five degrees would exceed a quantitative anthropomorphic "discomfort threshold." App. 7a-9a. The DOJ also asserted that the district court should defer to the agency's interpretation. The DOJ did not refer to any earlier manifestation of this interpretation and later conceded that no prior interpretation existed. App. 22a; *see also United States v. Cinemark*, 2003 WL 22508500, at *11 (documenting the DOJ's concession at oral argument that the earliest date that theater designers, owners, and builders were informed that "lines of sight" included "viewing angles" was in the DOJ's July 1998 *Lara* brief).

Cinemark immediately attempted to discover the basis for the DOJ's abrupt change of position. The DOJ successfully opposed Cinemark's attempt to depose an agency representative, to join the DOJ as a party, to assert claims against the DOJ under the APA challenging the legality of the purported interpretation, and to conduct other discovery concerning the basis for the purported interpretation, all on the grounds that deadlines for joinder and discovery had expired. The DOJ represented to the El Paso district court, however, that Cinemark was "free to assert its counterclaim (asserting a violation of the

Administrative Procedure Act) in a new action" against the government. App. 10a-11a.[8]

Cinemark soon thereafter filed a "new action" in Dallas, Texas seeking review of the DOJ's purported *Lara* interpretation. In a case styled *Cinemark USA, Inc. v. United States Department of Justice*, No. 3:99 CV 0183M (N.D. Tex.), Cinemark asserted that the DOJ's interpretation was a *de facto* legislative rule, improperly promulgated without notice and comment under the APA. The DOJ again resisted any discovery, objecting on the basis of deliberative process privilege. The DOJ again argued in a motion to dismiss that Cinemark's APA claim was not ripe for review because the agency's interpretation did not rise to the level of "'final agency action' subject to judicial review under the Administrative Procedure Act." App. 12a. A federal magistrate judge initially denied DOJ's motion to dismiss (App. 13a-14a), but the district court sustained the DOJ's objections and ruled in favor of the government, upholding the DOJ's contention that its interpretation was not "final agency action," and therefore dismissed the lawsuit for lack of jurisdiction. *Cinemark USA, Inc. v. United States Dep't of Justice*, 2000 WL 915091, at *3.

At the same time that the DOJ was asserting deliberative privilege and arguing that its interpretation did not constitute "final agency action," was not the considered judgment of the agency, was not binding, and lacked "force of law," the DOJ was preparing to file a nationwide enforcement action against

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8. The DOJ quashed deposition discovery focused on the factual basis of its new interpretation by filing a miscellaneous action in Washington, D.C. and arguing that "examination of this sort is not allowed, particularly when the government is not a party and the action does not challenge rulemaking." App. 15a-16a. When Cinemark subsequently articulated express APA claims "challenging rulemaking" against the DOJ in the Dallas and Cleveland lawsuits, the DOJ opposed discovery on deliberative privilege and work product grounds.

Cinemark based on the same core litigation position that the DOJ had first asserted in *Lara*. In March of 1999, after a year-long investigation that focused exclusively on Cinemark's Texas theaters, including on-site inspections limited to Cinemark's Texas theaters, the DOJ filed suit against Cinemark in the Northern District of Ohio, thereby requiring Cinemark to defend a national pattern and practice lawsuit in a jurisdiction and state hand-picked by the DOJ.[9] After Cinemark's motion to dismiss or transfer to a Texas court was denied, Cinemark pleaded counterclaims and again asserted that the DOJ was guilty of *de facto* legislative rulemaking in violation of the APA. Once again, the DOJ successfully secured dismissal of Cinemark's APA claims on grounds of "no final agency action." *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 11 (N.D. Ohio March 22, 2000) (*reproduced in* Regal Cinemas, Inc.'s Petition for a Writ of Certiorari, No. 03-641, at App. 75a-76a, filed previously with the Court). Once again, the DOJ opposed discovery on deliberative privilege and ripeness grounds. App. 17a-19a. To date, despite repeated attempts, neither Cinemark nor any other movie theater company has been able to conduct discovery on or secure judicial review of any of the various DOJ interpretations of Section 4.33.3 of ADAAG.

Moreover, despite prevailing against the DOJ and private plaintiffs in the Fifth Circuit's *Lara* decision in April of 2000, where the Fifth Circuit ruled in favor of Cinemark and expressly rejected the DOJ's interpretation of Section 4.33.3 of ADAAG, Cinemark was forced to defend itself again against DOJ claims in Cleveland, this time based on another interpretation of Section 4.33.3. In December of 2000, Cinemark moved for summary judgment in the *United States v. Cinemark* lawsuit, asserting

9. After suing Cinemark, the DOJ commenced litigation, either by enforcement actions or *amicus curiae* appearances, against the other largest movie theater companies in the country. *See* Regal Cinemas, Inc.'s Petition for a Writ of Certiorari, No. 03-641, at 8-10 and 12-13 n.10, filed previously with the Court.

that all of its stadium-style movie theaters provided wheelchair-using patrons with unobstructed views of the movie screen from wheelchair seating located amidst or adjacent to seating for the general public, and therefore complied with Section 4.33.3 as a matter of law. The DOJ opposed Cinemark's motion, arguing that Cinemark failed to comply with the "viewing angle" requirement it "interpreted" from Section 4.33.3. Despite prior arguments that its interpretation did not rise to the level of "final agency action," the DOJ asserted that its interpretation should nevertheless be accorded deference.[10] On November 19, 2001, the district court issued a memorandum opinion in which it rejected the DOJ's interpretation, refused to defer to the DOJ, granted Cinemark's motion for summary judgment, and entered final judgment for Cinemark. *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 11, 13 (N.D. Ohio Nov. 19, 2001).[11]

On January 24, 2002, the DOJ appealed the district court's ruling to the Sixth Circuit. The Sixth Circuit reversed the district court's decision, holding that certain parts of the DOJ's interpretation were entitled to deference, and remanded the case for further proceedings. *United States v. Cinemark*, 2003 WL 22508500, at *7, *11. In response to Cinemark's arguments that it was unfair to enforce the DOJ's "interpretation" of Section 4.33.3 retroactively in light of undisputed evidence that the DOJ encouraged Cinemark and others to rely on accessibility approvals granted under the agency's own state code certification program prior to announcing its "interpretation" of Section

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10. This time, however, the DOJ retreated from sponsoring a specific quantitative requirement, arguing instead that "lines of sight comparable" required stadium-style movie theaters to provide "viewing angles" for wheelchair seating within the range of viewing angles for most of the general public with respect to "distance to screen, obstruction of view, and distortion of images." App. 20a-21a.

11. The *United States v. Cinemark* district court opinion is discussed in Regal's Petition and a copy of the opinion is included in the appendix to Regal's Petition. *See* Regal Cinemas, Inc.'s Petition for a Writ of Certiorari, No. 03-641, at App. 49a-71a, filed previously with the Court.

4.33.3, the Sixth Circuit ordered the district court to strongly consider making any relief prospective only. *Id.* at *9, *10. Cinemark is presently considering whether to seek Supreme Court review of this decision.

REASONS FOR GRANTING REVIEW

To call the DOJ's modification of the ADAAG a mere "interpretation" is to perpetuate a particularly cynical fiction. To maintain the fiction, one would have to conclude that thousands of movie theater multiplexes across the country were built improperly. One would have to believe that independent architects and design professionals, working for every major movie theater company, repeatedly and severely misinterpreted the same law. One would have to pretend that a multitude of neutral governmental building and licensing inspectors in separate states, including inspectors working to enforce codes certified as meeting ADAAG requirements, each independently "got it wrong."[12] One would have to concede that an entire law-abiding industry simultaneously, pervasively, and consistently misapplied the same design requirement in the same disastrously mistaken way.

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12. The American Institute of Architects, a national organization representing 63,000 architects across the country, filed *amicus curiae* briefs in support of Cinemark in both the Fifth and Sixth Circuits. Relevant parts of the AIA *amicus* briefs are provided in Cinemark's appendix at App. 25a-38a. The AIA argued, in relevant part, that

> Here, the Texas Accessibility Standards ("TAS") were granted certification by the Attorney General in 1996, and Cinemark had been found to comply with that code. Both state and local officials had determined that the Tinseltown facility complied with TAS, and thus necessarily the ADA. . . . If the District Court's decision is affirmed, architects, builders, and building owners are left in the position of having no degree of certainty, and Congress's certification provision is rendered meaningless.

App. 29a.

The reality of *Stewmon* is that the DOJ is now permitted to modify building standards after the fact of construction and without public participation or due process. The public accommodation title of the ADA applies to virtually every major construction project in the United States. If this decision is permitted to stand, not one public facility is safe from post-construction second-guessing or ruinous retrofitting liabilities. As a result of this case, an entire industry is burdened with the obligation of making massive structural modifications. Even worse, no one — including the DOJ or the Ninth Circuit majority that deferred to the agency — has been able to provide adequate guidance to the movie theater industry on precisely what *is* required to build lawfully on a going-forward basis. Moreover, no one can credibly assert that design requirements will not abruptly change again should the DOJ decide to "reinterpret" its regulation again.

The Ninth Circuit's decision to accord controlling deference and retroactive effect to the government's casual and post-construction modification of design standards is both profound and insidious. It is no exaggeration to say that the nation sits on the precipice of a public accommodations construction nightmare. The lower courts require guidance on the level of deference, if any, that should be afforded to an agency's after-the-fact imposition of new design obligations, presented through litigation and without complying with the notice and comment strictures of the APA. Builders, owners, and operators of places of public accommodation require protection from high-handed agency overreaching. The public requires assurance that agencies may not take property and impose penalties without fair notice. Each of these issues is squarely presented in the Ninth Circuit's *Stewmon* decision and the recent Sixth Circuit opinion in *United States v. Cinemark*.

A. *United States v. Cinemark* Exacerbates The Pending Circuit Conflict And Provides Further Support For Accepting Review.

After Regal filed its petition on October 27, 2003, the Sixth Circuit issued its opinion in *United States v. Cinemark USA, Inc.* Perpetuating an unusual phenomenon in the case law addressing Section 4.33.3 of ADAAG, in which every decision made by a district court (regardless of which side prevails) is either reversed or vacated on appeal, the Sixth Circuit reversed the Northern District of Ohio's earlier decision to grant summary judgment in favor of Cinemark.[13] The resulting opinion creates even more confusion than previously existed. While it is clear that the Ninth Circuit and the Sixth Circuit disagree with the Fifth Circuit on what is required to provide "lines of sight comparable" under Section 4.33.3, it is equally clear that these courts do not fully agree with each other on any other issue. The result is a 1-1-1 circuit conflict on a specific issue of federal law interpretation, on the more general issue of deference to an agency's interpretation, and on the fair notice doctrine issue.

The Sixth Circuit concluded that Section 4.33.3 requires public accommodations to provide more than unobstructed views to be "comparable," and stated that "the criteria for evaluating similarity, while not explicit in the regulation, doubtless include viewing angle." *United States v. Cinemark*, 2003 WL 22508500, at *5. This holding directly conflicts with the Fifth Circuit's holding in *Lara*. *See Lara*, 207 F.3d at 789

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13. *See United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 19, *rev'd*, __ F.3d __, 2003 WL 22508500 (6th Cir. Nov. 6, 2003); *Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002), *vacated*, No. 02-9034, 2003 WL 21510423 (2d Cir. July 1, 2003); *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (W.D. Tex. Aug. 21, 1998), *rev'd*, 207 F.3d 783 (5th Cir. 2000); *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001), *rev'd*, 339 F.3d 1126 (9th Cir. 2003).

("we cannot conclude that the phrase 'lines of sight comparable' requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen"). However, unlike the Ninth Circuit, the Sixth Circuit did not find that the wheelchair seating locations at Cinemark's stadium-style movie theaters violated Section 4.33.3, and remanded to the district court the issue of "determining the extent to which lines of sight must be similar for wheelchair patrons" in the first instance. *United States v. Cinemark*, 2003 WL 22508500, at *8.

The circuits also conflict with respect to how they have applied the deference doctrines to the DOJ's litigating position. The Sixth Circuit stated that "[t]he DOJ's interpretation should be upheld unless it is 'plainly erroneous or inconsistent with the regulation,'" and then found that the DOJ's position that a "viewing angle" component should be considered when assessing comparability was "neither plainly erroneous nor inconsistent with the regulation." *Id.* at *7. The fact that the Sixth Circuit deferred to the DOJ's interpretation at all provides conflict with *Lara*, where the Fifth Circuit rejected the DOJ's "litigating position" completely. *See Lara*, 207 F.3d at 788 (court could not adopt DOJ's interpretation because "questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3" and "additional language will be necessary to codify the DOJ's litigating position"). Unlike *Stewmon*, however, the Sixth Circuit deferred only to DOJ's core position that viewing angles must be considered, and declined to adopt the DOJ's interpretation to the extent that doing so would require a finding that Cinemark's wheelchair seating locations actually violated Section 4.33.3. *Compare United States v. Cinemark*, 2003 WL 22508500, at *8, *with Stewmon*, 339 F.3d at 1133.[14]

The conflict persists with respect to the fair notice issue. The Sixth Circuit concluded that "Cinemark's reliance on TAS

14. The analysis of both courts was flawed, however, by their mutual failure to inquire, as a threshold matter, whether the DOJ's position was genuinely interpretative. *See* Section B of this Brief, *infra*.

and the government's statements with respect to the state building code certification process weigh strongly in favor of making any relief that the district court grants the government apply only on a prospective basis." *United States v. Cinemark*, 2003 WL 22508500, at *9. This conflicts with the apparent assumption by the *Stewmon* majority that relief should be retroactive. *See Stewmon*, 339 F.3d at 1132 (ordering district court to grant summary judgment for plaintiffs), 1134 (discussing effects of retroactive application of the majority's ruling) (Kleinfeld, J., dissenting).

The holdings in these cases cannot be reconciled. Analyzing *Lara*, *Stewmon*, and *United States v. Cinemark* reconfirms Judge Andrew Kleinfeld's observation that builders of public accommodations have been put "in a position of impossible uncertainty as to what they must do to comply with the law." *Stewmon*, 339 F.3d at 1133 (Kleinfeld, J., dissenting).

B. The Court Should Grant Review To Clarify Its Position On Deferring To Informal Agency "Interpretations" Of Regulations.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court announced a doctrine that generally provides for judicial deference to *reasonable* agency interpretations of *ambiguous* statutes. In the cases of *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead*, 533 U.S. 218 (2001), the Court elaborated on and refined this doctrine. The essence of *Mead* and *Christensen* is that *Chevron*-style deference applies only to agency interpretations that result from formal adjudication, notice-and-comment rulemaking, or some other method by which Congress intended to grant comparable law-making authority and which evidences the considered judgment of the agency.[15] While

15. Where *Chevron* does not apply, the agency's interpretation is reviewed *de novo* and is entitled only to "weight" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the amount of which depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 164.

Christensen and *Mead* curb agency abuse inherent in overly aggressive *statutory* interpretation, these cases do not expressly speak to the possibility of similar agency misconduct disguised as interpretation of an agency's own regulations. This Court should provide guidance on the limitation of judicial deference to informal agency pronouncements (including litigating positions) about agency *regulations*, particularly when such pronouncements effectively amend or add substance to the regulations.

The confusion in the lower courts is manifest, as illustrated in the present circuit conflict. The Ninth Circuit in *Stewmon* and the Sixth Circuit in *United States v. Cinemark* each purport to rely on Supreme Court case law to support ceding *controlling* deference to the DOJ's litigation position. The Ninth Circuit cites *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and the Sixth Circuit cites *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), along with *Auer*, both of which derive in large part from the pre-APA case of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), where the Court stated that an "administrative interpretation . . . becomes of controlling weight unless it is *plainly erroneous or inconsistent* with the regulation."[16] As demonstrated in the present case, uncritical adherence to the *Seminole Rock* standard of deference imbues even lower level agency officials with virtually unlimited power to modify and create law. Furthermore, agencies are actually encouraged to develop vague regulations, thereby preserving maximum bureaucratic "flexibility." The Ninth and Sixth Circuits apparently read *Auer* and *Seminole Rock* to require absolute acceptance of agency pronouncements with little or no regard for transparency of decision-making process, consistency of

16. Dicta in *Christensen* explains that "*Auer* deference is warranted only when the language of the regulation is ambiguous" adds some confusion to the proper deference analysis, but in no way excuses a threshold inquiry of whether or not the informal agency position is truly interpretative in the first place. *See Christensen*, 529 U.S. at 588. Where the agency position is not truly derivative of the regulation, it should not be accorded *Auer*-type deference.

agency position, whether the agency considered all relevant factors, or impact on a regulated public. Here, the Ninth and Sixth Circuits do not even inquire as to whether the agency's position is genuinely "interpretative." Thus, by merely *claiming* to interpret a regulation, the agency is accorded the practical opportunity to manufacture wholly new substantive requirements (or even change course on existing requirements) without having to articulate its reasoning, hear opposing views from the public, or incur the burden of meaningful judicial review.[17]

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17. The threshold issue of whether the agency's pronouncement is truly interpretative is thus critically important. The primary justification for the "interpretation" exception to notice and comment under the APA derives from the assumption that, by simply "interpreting," the agency is not making new law, but is merely explaining content already inherent in the regulation. This assumption is invalid when the agency finesses "interpretations" to create new obligations. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 Admin. L. Rev. 547 (2000); Robert A. Anthony, *Interpretive Rules, Legislative Rules and Spurious Rules: Lifting the Smog*, 8 Admin. L. J. Am. U. 1 (1994). It is vitally important that the Court police agencies with respect to this type of conduct. Deference ought not be accorded to informal agency action that is not genuinely interpretative. Authentic interpretation in this sense was described by Professor Anthony:

> To interpret is to derive a proposition from existing law whose meaning compels or logically justifies the interpretation. To be susceptible to interpretation, the existing law must have some tangible meaning (rather than empty or vague language like 'fair and equitable' or 'just and reasonable') that can be interpreted. There must be a logical connection between the substantive content of the existing statue (or legislative rule) and the substantive content of the document that purport to interpret it, such that the latter flows fairly from the former.

Robert A. Anthony, *Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty Policy Analysis*, Policy Analysis, August 11, 1991, at n.15, available at http://*www.cato.org/pubs/pas/pa-312.html*.

The rote reading of *Seminole Rock* and *Auer* advocated by the DOJ and adopted by the Ninth Circuit does not even impose the low threshold standard of reasonableness (required of statutory interpretation in *Chevron*), no matter how informal (or disingenuous) an agency's purported "interpretation." Instead, the Ninth Circuit merely inquires whether the interpretation is "*plainly erroneous or inconsistent*" with the regulation. Thus, and paradoxically, it is more difficult to overturn informal (even low-level) agency pronouncements, so long as they purport to be interpretations of regulations (such as the *amicus curiae* interpretation in this case), than it is to overturn a regulation adopted with notice and comment in accordance with the APA.[18]

This Court should resolve the circuit conflict on the level of deference accorded an informal agency pronouncement under the circumstances here. *Lara v. Cinemark USA, Inc.* conflicts with the reasoning of the Ninth and Sixth Circuits. Additional Fifth Circuit authority, as well as cases in the Third, Seventh, and D.C. Circuits, also conflict with the rationale of the Ninth and Sixth Circuits. *See, e.g., Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000) (litigating positions may not reflect fair and considered judgment of agency); *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999) (rejecting interpretation as not derivative of regulation); *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999) (legal brief not entitled to deference); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998);

18. The combined effect of intentionally ambiguous regulations and an agency's opportunistic assertion of deference under *Seminole Rock* is also inconsistent with section 706 of the APA, which states that "the reviewing court shall determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (2000). Taken to extreme, overly generous judicial deference also leads inevitably to a practical constitutional separation of powers issue by uniting lawmaking and law-exposition in the same agency hands. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 631, 638-54 (1996).

National Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997); *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996) (declining to defer to purported interpretation).

C. This Court Should Grant Review To Reinforce The Viability Of The Fair Notice Doctrine.

Cinemark's experiences with the DOJ exemplify the costly effects of agency overreaching. At no time prior to July 1998 did the DOJ take any action that put Cinemark or others on notice of an "interpretation" that Section 4.33.3 of ADAAG mandated compliance with a quantitative "viewing angle" requirement. Concerning Section 4.33.3, the DOJ first maintained silence, later admitted that it had not yet taken a position on the issues, and then abruptly announced via *amicus curiae* brief filed in *Lara v. Cinemark* the existence of a "viewing angles" requirement "interpreted" from the phrase "lines of sight comparable" in Section 4.33.3. The DOJ variously refers to the rule first announced in its *Lara amicus* brief, and later restated and broadened in enforcement actions against Cinemark and others, as a mere "interpretation" or "litigating position." No matter what terminology is used, by claiming insulation from public or judicial review for its informal pronouncements on one hand, but on the other hand asserting entitlement to *Seminole Rock* or *Auer* deference in the courts, the DOJ has engaged in illegal rulemaking. It has effectively established a new construction standard, imposed new obligations, and departed from all prior articulations of Section 4.33.3 in small venues. Under the pretext of advancing an "interpretation," the DOJ has consciously and callously sidestepped Congressionally mandated rule-making procedures, as well as judicial review, intruding into province of both legislature and judiciary.

It is uncontested that the DOJ's new "viewing angle" standard or rule was adopted without notice of any kind whatsoever. It was not until Cinemark had designed, built, obtained pre- and post-construction approvals, and opened scores of stadium-style movie theaters for business that it first received notice that the DOJ intended to "interpret" Section 4.33.3 differently to stadium theater construction as compared to other small areas of "public

assembly," including traditional sloped-floor movie theaters. Moreover, the DOJ factors leading to the adoption of the new rule, valid or invalid, well-reasoned or not, remain unknown to Cinemark because the DOJ has repeatedly maintained that it did not engage in "final agency action" to avoid judicial review of its purported interpretation, and blocked all attempts to secure discovery concerning its pronouncements on Section 4.33.3. Thus, the DOJ not only asserts the right to unilaterally impose new building standards in the guise of an "interpretation," but also claims the privilege of forever shielding from public scrutiny the "facts" considered, the reasoning applied, and the process utilized in setting that new standard.

The resulting damage to Cinemark and the movie theater industry offends all notices of due process and justice. Stadium-style movie theater multiplexes that were designed and constructed in meticulous compliance with the plain language of applicable federal and state accessibility regulations (Section 4.33.3 of ADAAG and its state counterparts), as well as then-accepted industry interpretations and the DOJ's prior pronouncements on the regulation, before the DOJ's new rule was announced, are now deemed "inaccessible" and subject to ruinous retrofitting costs. Moreover, the DOJ's willful propagation of the fiction that Section 4.33.3 has "always required" what the agency currently espouses unfairly paints Cinemark and all others who have built public facilities in reliance on the prior standards as scofflaws. The DOJ's posturing also makes these companies inappropriately vulnerable to ADA lawsuits by both private individuals who are encouraged, with or without DOJ's *amicus* participation, to assert the DOJ "expert" interpretation to the courts.[19]

---

19. In addition, the initial district court holding in *Lara v. Cinemark*, later reversed on appeal, generated opportunistic "copycat" lawsuits against Cinemark, including *Wittie v. Cinemark USA, Inc.*, No. A-98-CA-40JN (W.D. Tex. 1998); *Vander Hee v. Cinemark USA, Inc.*, No. M-98-230 (S.D. Tex. 1998); *Drey v. Cinemark USA, Inc.*, No. H-98-2021 (S.D. Tex. 1998); *Freeland v. Cinemark USA, Inc.*, No. 1:98CV1976 (E.D. Tex. 1998); and *Wittie v. Cinemark USA, Inc.*, No. GN102313 (Travis County, Texas Feb. 27, 2003). All of these lawsuits were ultimately decided in favor of Cinemark, the last by jury verdict.

Even buildings constructed in reliance on advance state and local agency approvals, obtained under a statutory certification program developed and endorsed by the DOJ itself for the express purpose of providing builders with pre-construction assurances of compliance with the ADA are now labeled illegal by that same government agency, with the result that private individuals are being encouraged to sue Cinemark and others.

CONCLUSION

Under the guise of "interpretation," and by consciously manipulating judicial deference doctrines, the DOJ has overstepped its proper province. The agency has "*defacto* created" a legislative rule, unfettered by public participation, virtually unaccountable to the courts, and without regard to the rulemaking procedures required by Congress.

For the foregoing reasons, Cinemark USA, Inc. respectfully submits that the Court should grant Regal Cinemas, Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

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(214) 969-2800

Counsel for Amicus Curiae

APPENDIX A — BUILDING CODE CERTIFICATION DATED SEPTEMBER 27, 1996

FOR IMMEDIATE RELEASE
FRIDAY, SEPTEMBER 27, 1996

CR
(202) 616-2765
TDD (202) 514-1888

TEXAS RECEIVES BUILDING CODE CERTIFICATION

WASHINGTON, D.C. — Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act (ADA).

Texas is only the second state in the nation to receive such certification. Washington state codes were certified in March 1995.

"Everyone in the state of Texas – builders, architects, business owners, and the general public – will benefit from Texas' new accessibility standards," said Assistant Attorney General for Civil Rights Deval L. Patrick. *"Certification makes it easier to comply with the law."*

Under the ADA's Standards for Accessible Design, newly constructed or altered public and commercial facilities must be built to be accessible to people with disabilities. States may now apply for certification by the Justice Department if their building codes are equivalent to the federal guidelines. Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

APPENDIX B — EXCERPTS FROM DEPARTMENT OF JUSTICE, CERTIFICATION OF STATE AND LOCAL BUILDING CODES

DEPARTMENT OF JUSTICE

CERTIFICATION

OF

STATE AND LOCAL BUILDING CODES

* * *

Why is Certification Important?

A major part of the effort to implement the ADA relies on voluntary compliance by businesses. Code certification facilitates voluntary compliance by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

* * *

Appendix B

On Sept 23, 1996, the DOJ certified that the Texas Accessibility Standards meet or exceed the requirements of the ADA Standards for Accessible Design.

* * * *

APPENDIX C — EXCERPTS FROM THE AFFIDAVIT OF LAURA M. FRANZE DATED APRIL 26, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:99-CV-0183-L

CINEMARK USA, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

AFFIDAVIT OF LAURA M. FRANZE

* * *

3. Immediately after Cinemark first received notice that DOJ was conducting an investigation based on (a) complaint(s) about wheelchair seating at three of Cinemark's theaters in Texas (including Tinseltown in El Paso), I, on behalf of Cinemark, requested a meeting with DOJ's designated representative in the investigation, Edward Miller. Mr. Miller represented that he is an attorney with the Disability Rights Section of the Civil Rights Division of the U.S. Department of Justice.

4. After telephone consultation with Mr. Miller, he agreed to a face-to-face meeting at his office in Washington, D.C. at 10:00 a.m. on March 5, 1998.

5. At that meeting, I asked Mr. Miller whether Defendant's blueprint configurations (which had been previously provided to Mr. Miller) showing wheelchair and general seating configuration for theaters in Pflugerville, El Paso (Tinseltown) and Pasadena, Texas, were in compliance with the ADA. Mr. Miller said, "we haven't taken a position on that." I then asked whether the Agency had taken a position on whether there was a minimum viewing angle for wheelchair seating. He said, "no, we have not." I asked whether the Agency was going to take a position on either of these issues. He said, "that's what this investigation was about – we haven't decided." I asked whether the Agency had ever taken a position on placement of wheelchair seating in a stadium theater. Mr. Miller said that DOJ had not taken a position other than 4.33.3. I asked whether there was any requirement that wheelchair seating had to a certain percentage of the way back from the screen." He said there was no official position. I asked whether there was an unofficial position. He said, "no." I asked whether the DOJ had ever taken a position on wheelchair viewing angles in any settlement or other document. He said, "no." I asked whether he could give Cinemark any guidance on the viewing angle requirements for wheelchair seating or seating configuration generally. He referred me to regulation 4.33.3. I asked whether 4.33.3 required a minimum viewing angle and he said that the DOJ had no official position on that. I asked whether Mr. Miller could provide Cinemark with any further clarification as to the DOJ's position on the meaning

of 4.33.3. Mr. Miller said, "no." I explained that Cinemark was still building theaters and Cinemark was interested in a safe harbor – i.e., a position that DOJ felt was clearly permissible under the law even if Mr. Miller could not give me the exact parameters. He said that he could add nothing to the law and the regulations – he repeated that DOJ had taken no position on the location or viewing angle of wheelchair seating within stadium movie theaters other than the law and 4.33.3.

* * * *

APPENDIX D — EXCERPTS FROM BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES DATED JULY 21, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

CIVIL ACTION NO. EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, AND MYRA MURILLO,

Plaintiffs

V.

CINEMARK USA, INC.,

Defendant.

BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES

* * *

5. The SMPTE guideline, based on anthropmetric data and numerous studies, establishes that physical discomfort occurs when the vertical viewing angle to the top of the screen

exceeds +35 degrees, while the vertical range of "easy head movement" is +30 degrees. Exhibit 3 at 1-5. Physical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction. Exhibit 3 at 5.

6. The SMPTE Guideline also recognizes that "the normal line of sight to 12 to 15 degrees *below* the horizontal" (or -12 to -15 degrees) (emphasis added). Exhibit 3 at 5. Because of this, the "optimum viewing zone" is from horizontal at eye level (0 degrees) to -30 degrees. Exhibit 3 at 2, fig. 1. The SMPTE Guideline therefore recommends that, to avoid excessive vertical viewing angles and to bring the vertical viewing angle closer to zero degrees, seat backs should be tilted the same amount, 12 to 15 degrees. Exhibit 3 at 5.

* * *

. . . the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public. In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the

general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight." *See* Exhibit 3 at 1-5.

* * * *

APPENDIX E — EXCERPTS FROM RESPONSE OF *AMICUS CURIAE* UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND SCHEDULING ORDER DATED AUGUST 21, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CIVIL ACTION NO.
EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, and MYRA MURILLO,

Plaintiffs

V.

CINEMARK USA, INC.,

Defendant.

RESPONSE OF *AMICUS CURIAE* UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND SCHEDULING ORDER

* * *

Appendix E

Further, as will be explored more fully should the Court permit the filing of the motion to add the United States as a party, Defendant is without any substantive basis for delaying this action. First, the United States is not a necessary party pursuant to Federal Rules of Civil Procedure 19(a)(1) because either party to this litigation may be accorded full relief without the joinder of the United States. The Defendant is free to assert its counterclaim (asserting a violation of the Administrative Procedures Act) in a new action. That counterclaim is not related to any of Plaintiffs' claims or Defendant's defenses, and would require discovery, evaluation of jurisdictional and other motions, and other procedures that could take months or years to resolve. As such, it would delay unnecessarily this action and impose unreasonable burdens of this Court.

* * * *

APPENDIX F — EXCERPTS FROM DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DATED APRIL 2, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:99-CV-0183-L

CINEMARK USA, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

* * *

Under well-established Supreme Court and appellate precedent, the Department of Justice's actions challenged here — interpreting its regulations in the context of carrying out its enforcement mandate — are not "final agency action" subject to judicial review under the Administrative Procedure Act. Moreover, Cinemark will have a full opportunity to raise its objections to the Department of Justice's actions as defenses in the enforcement suit filed against it. Therefore, the Court does not have jurisdiction to hear this case.

* * * *

APPENDIX G — EXCERPTS FROM TRANSCRIPT DATED SEPTEMBER 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NUMBER

3:99-CV-0183-L

September 17, 1999

CINEMARK USA, INC.

Plaintiff,

VERSUS

UNITED STATES DEPARTMENT OF JUSTICE

Defendant.

TRANSCRIPT OF DEFENDANT'S MOTION TO DISMISS BEFORE THE HONORABLE JEFF KAPLAN UNITED STATES MAGISTRATE JUDGE

* * *

[28] . . . The Justice department's position regarding the proper interpretation of Section 4.33.3 was unequivocally stated in its amicus brief filed with the Lara court. The detailed and thoughtful argument contained in that brief suggests that it would be the considered result of deliberation

within the agency, not merely an off-the-cuff remark by a subordinate.

Moreover, the brief bears the name of Bill Lan Lee, the Acting Assistant Attorney General for civil rights and four of his deputies. There is no doubt that the position advocated by the Justice Department was endorsed by the head of the civil rights division.

Finally, the DOJ argues that Cinemark has, quote, "other adequate remedies in court," close quote, because the issue maybe fully litigated in the enforcement action. See 5 USC Section 704.

This misconstrues the statute. The quoted language was intended to prevent district courts from considering cases where special statutory procedures already provide for review on specific agency's actions. See for [29] example Bolen Versus Massachusetts 108 Supreme Court 2722 at 2737, 1988, noting that orders of the Federal Trade Commission and National Labor Relations Boards are subject to direct review in the courts of appeals. It does not divest the district court of otherwise proper jurisdiction under the APA.

For these reasons the court concludes that the Justice Department's interpretation of Section 4.33.3 of the ADA Accessibility guidelines constitutes final agency action that is subject to judicial review under the Administrative Procedures Act. The resolution of this issue pretermits consideration of whether the mandamus act and venue act provide a waiver of sovereign immunity.

* * * *

APPENDIX H — EXCERPTS FROM PETITIONER UNITED STATES' MOTION FOR A PROTECTIVE ORDER DATED APRIL 2, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No.

ORAL HEARING REQUESTED

United States of America,
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
1425 New York Avenue, N.W.
P.O. Box 66738
Washington, D.C. 20035-6738

Petitioner,

V.

Cinemark USA, Inc.,
7502 Greenville Avenue,
Suite 800
Dallas, Texas 75231-3891

Respondent.

EXCERPTS FROM PETITIONER UNITED STATES' MOTION FOR A PROTECTIVE ORDER

* * *

Appendix H

Cinemark seeks discovery from the United States on two areas. First, Cinemark seeks discovery on purely legal issues: the regulatory requirements for wheelchair seating and wheelchair lines of sight under the ADA, the internal diliberative process and discretionary rulemaking functions in the Department's development of the regulations issued under the ADA, and the ADA certification by the Department of Texas state code's accessibility standards. Second, Cinemark seeks discovery on settlements the Department has entered into on these legal issues, seeking privileged information on negotiations and the litigation strategies in this and other cases.

This Court should grant the motion for a protective order and quash the notice of deposition. As shown more fully below, examination of this sort is not allowed, particularly when the government is not a party and the action does not challenge rulemaking. Further, such examination is prohibited, since it delves improperly into the deliberative processes of agency decision makers, and also seeks information from litigators about privileged material.

* * * *

APPENDIX I — EXCERPTS FROM PLAINTIFF UNITED STATES' RESPONSE AND OBJECTIONS TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS DATED MARCH 1, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO.1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

V.

CINEMARK USA, INC.,

Defendant.

PLAINTIFF UNITED STATES' RESPONSE AND OBJECTIONS TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

The United States hereby responds and objects to Defendant Cinemark USA's First Request for Production of Documents and Things.

Appendix I

General Objections

The following General Objections are hereby incorporated into the United States' response to each of the following requests for production.

* * *

The United States also objects to these requests to the extent that they seek documents or information that is protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, the law enforcement investigatory privilege, and any other applicable privilege and/or doctrine. The United States further objects to these requests to the extent that they seek discovery of materials already in Defendant's possession as such discovery is unduly burdensome. Subject to and without waiving any objections or privileges, the United States will produce all responsive and discoverable material related to wheelchair seating in stadium style movie theaters.

* * *

Request for Production No. 9:

All documents and other tangible things referring or relating to any DOJ interpretation(s) of JDSAD, Section 4.33.3 in the context of movie theaters, movie auditoriums, or movie complexes.

Response:

The United States objects to this request on the grounds that it seeks discovery related to defendant's counterclaim alleging violation of the APA, pending a ruling by the Court on the United States' Motion to Dismiss Defendant's Counterclaims and Defendant's Motion for Partial Summary Judgment on the counterclaim, and seeks discovery that is not legally permissible in APA-based actions. The United States further objects to this request on the grounds that it seeks disclosure of documents that are protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, and the law enforcement investigatory privilege. The United States additionally objects to this request on the grounds that it seeks disclosure of documents that are not relevant or likely to lead to the discoverability of admissible evidence and is overbroad. See also response and objections to Request for Production No. 8, incorporated herein. Subject to and without waiving any objections or privileges, the Department responds that all other relevant, nonprivileged documents responsive to this request are produced under Request for Production No. 8.

* * * *

APPENDIX J — EXCERPTS FROM MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT DATED JANUARY 17, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO.1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

v.

CINEMARK USA, INC.,

Defendant.

EXCERPTS FROM MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

* * *

In designing and constructing movie theaters, experts such as engineers and architects consider such factors as vertical and horizontal viewing angles, distance from the screen, obstruction, and distortion. U.S. Facts at 27-32. However, the Standards do *not* establish specific minimum

or maximum viewing angles, distance to the screen, obstruction of view, or distortion of images that a movie theater is legally permitted to provide for wheelchair spaces. Instead, the regulation requires that the line of sight be comparable; that necessarily requires that viewing angles, distance to the screen, obstruction of view and distortion of images also be comparable between patrons who use wheelchairs and most members of the general public. For example, although various industry design standards provide that no seat should have a viewing angle to the top of the screen exceeding 30-35 degrees because of discomfort, *see, e.g.*, SMPTE Engineering Guideline, Design of Effective Cine Theaters (1994), at 5, 7, App. at 18, the Department does *not* adopt that 30-35 degree measurement as a maximum for wheelchair spaces. Under Standard 4.33.3, the only applicable requirement for lines of sight for wheelchair spaces is comparability. . . .

* * * *

APPENDIX K — EXCERPTED PLAINTIFF UNITED STATES' AMENDED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 16, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff,

V.

CINEMARK USA, INC.,

Defendant.

PLAINTIFF UNITED STATES' AMENDED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

Regardless, as a factual matter, the *Lara* brief is not inconsistent with prior interpretations of Standard 4.33.3. First of all, there are no such prior interpretations in the context of stadium-style theaters. As Cinemark itself acknowledges, prior to 1998 the Department of Justice had

never interpreted Standard 4.33.3 in the context of stadium-style theaters. *See* Cinemark Exh. L ¶ 5. The "historical pronouncements" on which Cinemark places such importance date to an era when stadium-style theaters did not even exist. *See* Cinemark Br. at 7. But as agencies can apply existing regulations to new facts without engaging in rulemaking at all, *see, e.g., Guernsey Mem. Hosp.*, 514 U.S. at 96, they cannot be bound by interpretations that may have been developed before those facts even existed. Similarly, the primary "pronouncement" on which Cinemark relies — an alleged oral statement from April 1991 — *pre-dates* the promulgation of Standard 4.33.3. *See* Cinemark Br. at 7, 18. Obviously, even if this reported oral statement were otherwise worthy of credence, the Department of Justice cannot be bound by alleged interpretations that pre-date the authority being interpreted.

* * * *

APPENDIX L — BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF ARCHITECTS IN SUPPORT OF CINEMARK USA, INC. AND SEEKING REVERSAL DATED JUNE 3, 1999

NO. 99-50204

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

JOSE G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECK, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, MYRA MURILLO, MARGARITA LIGHTBOURNE-HARBECK,
Plaintiffs-Appellees,

v.

CINEMARK, USA, INC.,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
El Paso Division
Civil Action No. EP-97-CA-502-H
Honorable Harry Lee Hudspeth,
United States Chief District Judge

BRIEF OF AMICUS CURIAE
AMERICAN INSTITUTE OF ARCHITECTS

In Support of Cinemark USA, Inc.
and Seeking Reversal

Appendix L

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AMERICAN INSTITUTE FOR ARCHITECTS

Appendix L

INTEREST OF AMICUS

The American Institute of Architects ("AIA"), headquartered in Washington, D.C., is a national organization representing 63,000 architects across the country. AIA members comprise a broad cross-section of architects responsible for the design and construction of many types of structures that require compliance with the ADA.

The AIA supports the purposes of the ADA statute for Americans with disabilities and expanding the opportunities for fulfillment for persons with disabilities has long been a part of AIA's public policy. AIA seeks leave in this appeal to apprise this Court of one aspect of the District Court's opinion which adversely affects architects. The District Court read the certification of codes process provided by the ADA out of the statute. That process, established by Congress, provides a means by which federal, state and local governments can work together to ensure that architects, builders and building owners can determine, from the beginning, how to comply with ADA requirements. In order to obtain compliance with the ADA, its statutory requirements must be understandable and achievable. Thus, the certification process provides a smooth and workable method to assure that the buildings that are constructed are accessible, avoiding the inefficiencies and delays imposed by litigation and retrofitting. With the evolving nature of the ADA, the certification process is currently the only means available for architects to ensure that they are acting in accordance with ADA requirements, thereby providing a safe harbor from liability. Without that process, architects will be frustrated in their ability to develop building designs that comply with the ADA and achieve Congress' goals with respect to accessibility.

Appendix L

INTRODUCTION

Architects have no stake in which specific requirements are imposed by the ADA. An architect does not have an interest in whether the ADA requires one wheelchair accessible seat or one hundred wheelchair accessible seats in a facility.[1] Architects can develop their designs to comply with ADA requirements. However, architects can only do so if they can determine with certainty what requirements the ADA imposes for the facilities they are designing.

State and local governments have long used a very workable method for obtaining compliance with their building and fire codes. Prior to obtaining permits for construction, the architect provides the code official with the plans and specifications for the project to allow the official to determine whether the proposed project complies with all applicable rules and regulations. When an aspect of the design is found not to comply with the requirements, the architect can alter the plans and specifications to address the noncompliance.

Similarly, during the construction phase of the project, code officials inspect the facility to determine compliance requirements. This allows the official to physically see the project and analyze the facility relative to building accessibility requirements. Most importantly, the official can meet with the architect to address any problems or questions,

1. The focus of the AIA is not how Texas Accessibility Standards section 4.33.3 is interpreted in the context of stadium style theaters. It is only important that architects know what the proper interpretation is in order to design facilities in compliance with section 4.33.3.

and can make compliance decisions based upon a personal review of the actual facility.

The federal government does not have these types of mechanisms in place. The Department of Justice ("DOJ"), the agency charged with enforcing the ADA, does not have a system in place whereby architects may consult with DOJ regarding issues specific to a single project. DOJ's informal technical assistance line fields calls regarding ADA issues, but its advice is general and not legally binding on the agency. Thus, architects, even if they submit plans and specifications to DOJ, cannot obtain a finding that they meet the relevant ADA requirements, or do not meet requirements in identified ways. DOJ does not undertake inspections during the construction process to ensure that the facility is being constructed pursuant to all applicable ADA requirements. Rather, the only time DOJ evaluates a facility to determine ADA compliance is after a complaint has been filed, or an investigation has been undertaken. By that time, the facility may be finished or at least too far along to prevent wasteful construction and reconstruction, and may result in compromises that provide less perfect access than would have been possible if determined at an earlier stage.

The drafters of the ADA had the foresight to provide a means by which architects and builders who design could ensure that their designs complied with ADA regulations, by relying on the estimated 40,000 state and local building code enforcement systems. The certification provision, 42 U.S.C. § 12188(b)(1)(A)(ii), establishes that state and local entities may obtain certification from the Attorney General that their building codes meet or exceed the requirements of the ADA.

Architects may, therefore, receive guidance as to the appropriate choices for a certain facility, both before and during construction. When certification has been granted by the Attorney General, a facility found to be in compliance with the certified local or state accessibility standards is necessarily in compliance with the corresponding ADA requirements.[2] Architects whose plans and specifications have been approved under the certified building code should thus be assured that they will not later be found liable for failing to design a facility that is ADA compliant.

Here, the Texas Accessibility Standards ("TAS") were granted certification by the Attorney General in 1996, and Cinemark had been found to comply with that code. Both state and local officials had determined that the Tinseltown facility complied with TAS, and thus necessarily the ADA.[3] Nonetheless, the District Court found Cinemark not in compliance with the ADA. In doing so, the District Court eviscerated the certification provision. If the District Court's decision is affirmed, architects, builders and building owners are left in the position of having no degree of certainty, and Congress' certification provision is rendered meaningless.

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2. It is important to note that certification is not effective "if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation." 28 C.F.R. pt. 36, app. B. Thus, any concern that a local code official may simply waive an applicable requirement has already been addressed. No such issue was raised by plaintiffs below.

3. It was undisputed that the requirements of section 4.33.3 of TAS are more stringent than the requirements found in section 4.33.3 of the ADAAG. *Compare* TAS § 4.33.3 *with* ADAAG § 4.33.3.

AIA therefore requests that this Court give effect to the certification process of the ADA, and reverse the judgment entered against Cinemark by the District Court.

ARGUMENT

I. The Enactment Of The ADA And The Certification Process.

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(l). In drafting Title III regarding the construction and operation of public accommodations, however, Congress intentionally "painted with a broad brush" and then required the Attorney General to promulgate regulations to implement the ADA. *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 707 (D. Or. 1997). The Attorney General was directed to issue regulations consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. 42 U.S.C. § 12186(c).

Although ADAAG was created in 1991 as mandated by Congress, it was recognized at the inception of the ADA that the most effective enforcement of the ADA would be through compliance by builders and architects from the design phase forward. It was further recognized that compliance would best be achieved by encouraging states to adopt building codes which contained requirements at least as stringent as the ADA requirements. Where a state adopted a building code which set forth requirements equivalent to the ADA and this

is certified by DOJ, architects could then be assured of compliance with the ADA by complying with the certified code.

To achieve this result, a certification procedure was enacted which encouraged states and local entities to seek certification of their building codes by the Attorney General. Under the certification process, a building code will be certified where the "code meets or exceeds the minimum requirements of the [ADA] for the accessibility and usability of places of public accommodation and commercial facilities." 28 C.F.R. § 36.602. To guarantee the integrity of certification, a stringent process was put in place which includes the submission of a formal application seeking certification, as well as public hearings both at the state or local level, and in Washington, D.C. 28 C.F.R. § 36.603. Moreover, because the certification process was intended to be a substantive review of the state or local building code, the statute is designed to provide certain protections when the Attorney General has granted certification at the conclusion of the process finding that a state or local building code meets or exceeds the minimum requirements of the ADA:

> a[t] any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

28 C.F.R. § 36.602.

Appendix L

II. DOJ Has Recognized The Importance Of The Certification Process.

In identifying the purpose of the certification process DOJ has stated:

> It allows builders to rely on their local inspection processes . . . . It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

(R. 319). Moreover, Bill Lann Lee, Acting Assistant Attorney General of the Civil Rights Division, recently testified before the Subcommittee on the Constitution that he is a "big fan" of code certification because knowing and following the standards up front allows people to comply with the ADA. (*See* Exhibit A, p. 3).

Knowing from the beginning of a project how the standards apply is crucial for architects. Because of the intentionally broad language of the ADA and its implementing regulations, the application to a specific facility

is often difficult to determine.[4] The certification process provides a means for architects to determine in advance whether they are in compliance. As DOJ proclaimed in 1996 when Texas became only the second state to receive certification, "Everyone in the state of Texas — builders, *architects*, business owners, and the general public — will benefit from Texas' new accessibility standards . . . Certification makes it easier to comply with the law." (R. 320) (emphasis added).

In addition, the certification process was intended to reduce the need for ADA litigation involving builders and architects. By allowing local code inspectors to determine compliance issues early in the process, changes necessary to fully comply with the ADA requirements can be made more easily, and less expensively. (*See* DOJ press release of December 12, 1997, attached hereto as Exhibit B). Architects were informed that they would be entitled to "additional legal protection if they built in compliance with the certified code, but are later sued under the ADA." (*See* DOJ press release of May 27, 1998, attached hereto as Exhibit C). Thus, DOJ's position was that approval by Texas' state and local code officials would constitute a strong defense for architects if there were later complaints of discrimination. Certification,

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4. This case provides the perfect example. Although AIA takes no position as to the proper interpretation of section 4.33.3 here, it is important to note that DOJ never provided an interpretation of section 4.33.3 of the ADAAG in the context of stadium style theaters until this litigation was filed by plaintiffs. Cinemark therefore relied upon the interpretation of the state and local code officials who determined that Tinseltown complied with section 4.33.3 of TAS. (R. 456, 516, 1723).

therefore, was intended as a safe harbor for architects who attempted to comply with the requirements of the ADA by working with local code officials.

III. The Decision Below Eviscerates The Purpose And Consequences Of The Certification Process.

In complete disregard for the certification process provided by Congress and the goals of DOJ to provide architects with a safe harbor, the District Court disregarded the certification of TAS by the Attorney General and the determinations by state and local code inspectors that Cinemark complied with TAS. Plaintiffs had argued these were of absolutely no relevance. Further, plaintiffs did not dispute the evidence establishing that Tinseltown was found to be in compliance with all TAS requirements.

That evidence showed that prior to the construction of the facility, the plans and specifications for the Tinseltown complex were reviewed by Harry Manley, a plan reviewer for the City of El Paso. Manley had attended the Texas "Accessibility Academy" training course and passed the required examination with a score of 80 or better. (R. 321). Upon his review of the plans and specifications, Manley granted conditional approval for the project subject to certain revisions not applicable here. Notably, as to TAS section 4.33.3, Manley found that the plans and specifications submitted by Cinemark were in compliance with the requirements at issue in this case. (R. 516). In accordance with El Paso's duties as a Municipal Service Provider, Manley also submitted his conditional approval to the Texas Department of Licensing and Regulation. (R. 322). Manley

testified unequivocally that based on his experience and training, it was his opinion that the plans for Tinseltown complied with TAS section 4.33.3. (R. 506).

Furthermore, James Sheffield, a professional engineer and Independent Contract Provider for the State of Texas, conducted a full inspection of the facility during the construction process. (R. 322). Upon the completion of his inspection, Sheffield prepared a letter to Mr. Don Harton of Cinemark including a copy of his report. (R. 449-459). The report detailed the findings of the inspection, including the facility's compliance, or lack thereof, with various TAS requirements. Like Manley, Sheffield determined that the placement of wheelchair locations at Tinseltown complied with section 4.33.3. (R. 456). Sheffield also conducted a second inspection and again found that Tinseltown complied with section 4.33.3. (R. 1723). Thus, both before and during the construction process, Cinemark was specifically informed that its facility was in compliance with TAS section 4.33.3, and therefore necessarily met or exceeded the requirements of the ADA at issue in this case.[5]

Disregarding DOJ's expressed views that the certification process was intended to limit litigation, plaintiffs contended that the proper procedure for addressing these issues was

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5. The record also establishes that Cinemark worked with other code officials to ensure that Tinseltown complied with TAS and the ADA. Terry Lee Williams, the deputy Director for Building Services for El Paso, testified that he met with representatives from Cinemark on at least four occasions to discuss compliance issues. (R. 465). As with Manley and Sheffield, Williams was also of the opinion that Tinseltown complied with TAS section 4.33.3. (R. 472).

through a suit by Cinemark against the city and state. Specifically, plaintiffs stated:

> If the City and/or the State had some obligation to help Defendant meet its duty to comply, and either of [sic] both of those entities failed to meet their obligation, Defendant can bring a separate action against those entities, or could have cross claimed against them in this case.

(R. 801). Plaintiffs thus actually advocated additional litigation, as opposed to advancing one of the goals of certification: reducing litigation through compliance by architects and owners/developers. Clearly, however, litigation against code officials is not a purpose Congress sought to further through the certification process.

Even though the record contained unrefuted evidence that TAS had been certified as meeting or exceeding the ADA requirements, and that Tinseltown had been found to be in compliance with TAS, the District Court granted summary judgment in favor of plaintiffs without even addressing the effect of the Attorney General's certification of TAS, (R. 1259-63), although under the plain language of the ADA, the certification of TAS constituted *rebuttable evidence* that Cinemark complied with the ADA requirements. 28 C.F.R. § 36.602.

By ignoring the presumption granted to an architect who complied with a certified code, and granting judgment for plaintiffs, the District Court necessarily determined that government-determined compliance with the certified

building code was irrelevant. That decision is inconsistent with the terms and intent of the ADA. It effectively nullifies the certification process and undermines Congress' plan to encourage voluntary compliance with the ADA. In fact, the District Court's decision ensures voluminous litigation against architects, even when local code officials inform the architect that the facility complies with a certified statute.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF HOYTS CINEMAS CORPORATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Pursuant to Rule 37.2 of the rules of this Court, Hoyts Cinemas Corporation ("Hoyts") submits this brief as *amicus curiae* in support of petitioners Regal Cinemas, Inc. and Eastgate Theater, Inc.'s Petition for a Writ of *Certiorari*. This brief seeks to bring to the Court's attention Hoyts' interactions with the Department of Justice ("DOJ") that are directly relevant to the questions presented by petitioner and which have not been fully developed by the parties to this appeal. Both Petitioner and Respondent have consented for Hoyts to file this *amicus* brief.[2]

Hoyts is currently a defendant in litigations in two Circuits involving the same issues that Regal Cinemas, Inc. ("Regal") raises in its Petition for *Certiorari* to this Court. Hoyts was sued by the DOJ in the District of Massachusetts, in *United States of America v. Hoyts Cinemas Corporation and National Amusements, Inc.*, Civil Action No. 00-12567-WGY ("*U.S. v. Hoyts*"), as well as by private plaintiffs, Susan

1. This brief was not authored in whole or in part by counsel for a party to this proceeding. Hoyts was acquired by Regal Entertainment Group, the parent company of petitioner Regal, in a stock purchase transaction on March 27, 2003, years after almost all the events discussed in this brief occurred. Thereafter, the stock of Hoyts was acquired by Regal itself and Hoyts currently operates as a wholly-owned subsidiary of Regal. Since April 2003, Regal Entertainment Group, the parent company of both Regal and Hoyts, has paid Hoyts' legal fees in the action of *U.S. v. Hoyts*, including the fees expended for the preparation and submission of this brief. Hoyts is represented in the *U.S. v. Hoyts* and *Meineker* actions by separate counsel from petitioner.

2. Copies of both letters from the parties consenting to the filing of this brief have been filed separately with the Court.

Meineker and Sybil McPherson, in the Northern District of New York, in *Susan Meineker and Sybil McPherson v. Hoyts Cinemas Corporation*, Civil Action No. 98-CIV-1526 (DNH/DRH) ("*Meineker*").[3]

At the heart of both actions is the question whether the DOJ's latest interpretation of Section 4.33.3 of the ADAAG should be granted judicial deference, as it was in *Kathy Stewmon, et al. v. Regal Cinemas, Inc.* ("*Stewmon*"), 339 F.3d 1126 (9th Cir. 2003). Hoyts has first-hand experience with the DOJ's constantly-changing interpretations of Section 4.33.3. Over the years, various DOJ representatives have given Hoyts several contrary interpretations of Section 4.33.3, first in direct communications in the mid-1990's between Hoyts and the DOJ's technical assistance ADA "Helpline," and later, in the course of the DOJ's presentation of its case in *U.S. v. Hoyts*. Hoyts' experience with the DOJ's evolving interpretations of Section 4.33.3 bears directly on the question whether deference should be accorded to the DOJ's current interpretation of the regulation, which was adopted by the majority in *Stewmon*.

As a defendant in *U.S. v. Hoyts* and *Meineker*, Hoyts faces a very direct threat of drastic financial liabilities if the DOJ succeeds in its attempt to obtain court orders in those cases that require Hoyts to reconstruct hundreds of its movie theaters. The decision of the Ninth Circuit and of this Court is, therefore, of great importance to Hoyts.

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3. The DOJ has recently moved to intervene in the *Meineker* action to assert direct ADA claims against Hoyts.

SUMMARY OF ARGUMENT

Hoyts has direct (and endlessly frustrating) experience with the DOJ's continually-changing interpretations of Section 4.33.3. For years the DOJ has proclaimed that each of its interpretations of Section 4.33.3 is entitled to case-determinative deference, even though the DOJ has changed its interpretation of Section 4.33.3 so often that such conduct would never be tolerated from a private litigant.

For five years the DOJ has obdurately refused to use the notice and comment procedures of the Administrative Procedures Act ("APA") to revise Section 4.33.3. Instead, the DOJ has pursued a nationwide litigation crusade against movie-theater owners with the aim of compelling the entire industry to reconstruct, at breathtaking expense, thousands of movie theaters that were built years before the DOJ announced its new (and still evolving) views on the meaning of Section 4.33.3. The DOJ's conduct has produced a welter of conflicting judicial opinions on the meaning of Section 4.33.3, has evoked repeated criticism from federal judges, and has put the financial viability of Hoyts (as well as the entire movie theater industry) at risk.

The DOJ's approach to Section 4.33.3 is not reasonably based on the regulation's plain language. And it is driven by litigation strategy rather than sound policy. As a result, when courts like *Stewmon* defer to the DOJ's position, they only exacerbate the "impossible uncertainty" among architects, designers and theater owners as to what the law requires. *Stewmon*, 339 F.3d at 1133 (Kleinfeld, J., dissenting). Hoyts' experience with the DOJ's interpretation-of-the-month approach to Section 4.33.3 dramatizes how the DOJ is

abusing the *Auer* judicial deference doctrine[4] as a litigation weapon in the DOJ's war against the theater industry.

After the ADA was first promulgated, the DOJ issued regulations including Section 4.33.3 to carry out its mandates. Shortly after Section 4.33.3 was adopted, the government's own expert study advised the DOJ that there was substantial industry confusion about what Section 4.33.3 meant. The DOJ's response was prolonged silence; despite a statutory mandate to provide the public with technical assistance concerning ADA regulations, the DOJ issued no written advice or manuals whatever to explain how Section 4.33.3 applies to movie theaters. The only source of technical assistance available to Hoyts in those circumstances was a technical assistance "Helpline" set up by the DOJ to respond to questions about the application of the ADAAG. Hoyts contacted the Helpline in 1996, before Hoyts designed and built hundreds of multi-million dollar stadium-style theaters.

During those discussions, the DOJ gave direct guidance to Hoyts that Section 4.33.3 *permitted* Hoyts to place wheelchair seats in the flat, *front* section of Hoyts newly-designed, stadium-style theaters. Two years later, however, after 90% of Hoyts' stadium-style theaters were already built or under construction, the DOJ changed positions. In July 1998 the DOJ announced in an *amicus* brief filed in the *Lara* district court that Section 4.33.3 in fact required the placement of wheelchair seats in a certain part of the stadium section of such theaters that the DOJ deemed "desirable."

In December 2000 the DOJ sued Hoyts in *U.S. v. Hoyts*, alleging that *all* Hoyts stadium-style theaters violated Section

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4. *Auer v. Robbins*, 519 U.S. 452 (1997).

4.33.3 under the DOJ's new views of the regulation. During the *U.S. v. Hoyts* litigation, the DOJ changed its interpretation of Section 4.33.3 *at least four times*. The latest interpretation, presented just 60 days ago in the DOJ's First Circuit brief, is the same one that the DOJ advanced in the Ninth Circuit in *Stewmon* and to which the Ninth Circuit granted deference in August 2003.

The Ninth Circuit was wrong to defer to the DOJ's newest interpretation of the regulation. An agency's interpretation of its own regulation is not entitled to deference when that interpretation is merely a "convenient litigation position," especially one that continues to shift repeatedly throughout the litigation. Given the DOJ's shifting interpretations of Section 4.33.3, the DOJ's latest interpretation is plainly neither "fair" nor "considered"; rather, it is merely a post-hoc rationalization asserted to advance the DOJ's litigation position. *Certiorari* in this case should be granted because the *Stewmon* decision, by erroneously granting deference to the DOJ's latest interpretation of Section 4.33.3, undermines not only the established notice and comment procedures that are central to the APA, but also the even more fundamental due process requirement that all persons are entitled to reasonable notice of what the law demands.[5]

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5. Hoyts supports petitioner's other arguments for *certiorari* as well, but focuses on the issues in the text because of the significant additional perspective Hoyts believes it can contribute with respect to them.

ARGUMENT

I. The DOJ's Current Interpretation Of Section 4.33.3 Is Not Entitled To Deference Because It Is Only The Latest Of Many Shifting Interpretations Asserted By The DOJ To Support Its Litigation Position

Courts give deference to an agency's interpretation of its own regulation if there is no reason to doubt that the interpretation is the agency's fair and considered judgment on the matter. *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). But where the agency's interpretation is merely a "convenient litigation position," rather than the product of an agency's "fair and considered judgment," that position will not be afforded deference by the court. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Where an agency's position is inconsistent with the view advocated by the agency in past cases, it is not a fair and considered judgment. *Id.* at 212-13. And where the agency's interpretation has flip-flopped repeatedly throughout a single litigation it certainly is not entitled to deference. *Callaway v. Comm'r of Internal Revenue*, 231 F.3d 106, 132-33 (2d Cir. 2000). The DOJ's current interpretation of Section 4.33.3 is not entitled to deference because it is only the latest of a series of shifting positions tailored to suit the DOJ's litigation strategy in *U.S. v. Hoyts* and other cases.

A. The DOJ's Varied Interpretations Of Section 4.33.3

After Congress created the ADA on July 26, 1990, it expressly directed the DOJ to issue regulations to help carry out its provisions. 42 U.S.C. § 12186(b) (1990). The DOJ adopted such regulations on July 26, 1991. They were initially written by another federal agency, the Architectural and Transportation Barriers Compliance Board (the "Access Board"), and were known as the ADA Accessibility Guidelines for the construction and design of Buildings and Facilities ("ADAAG"). The purpose of ADAAG was to provide public facility owners, like Hoyts and Regal, with detailed guidelines for the design of public facilities so that they would properly accommodate disabled patrons.

1. The Language of Section 4.33.3 of ADAAG and the Confusion it Caused in the Movie Theater Industry

Section 4.33.3 states the requirements for wheelchair seating in "assembly" areas. It provides in relevant part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable to those for members of the general public.*

28 C.F.R. pt. 36, app. A at § 4.33.3, as set forth in Regal Cinemas, Inc.'s Petition for a Writ of *Certiorari* Appendix ("Pet. App.") at 45a (emphasis added).

Shortly after Section 4.33.3 was promulgated, the government commissioned a 1994 expert study that advised the DOJ of widespread industry confusion over what Section 4.33.3 required:

> [T]he research uncovered a *notable amount of divergence and confusion* among facility mangers, architects and individuals with disabilities in their interpretations of a number of *key, if ambiguous terms in ADAAG*. These differences are suggestive of areas in which clarification, explication and education are needed. For example, the *meaning of comparable sightlines* seemed to *vary significantly, depending on who you talked to.* There also were differences about the meaning of integrated or integral setting. Situations such as the above *suggest the need for working operational definitions for presenting and discussion findings related to ambiguous concepts.*

"Accessibility in Assembly Areas, Technical Report, Recommendations and Task Summaries," prepared for the Access Board, by the Center for Accessible Housing, reprinted in the Appendix to this Submission ("App.") at 2a (emphasis added).

In response to this industry confusion, the National Association of Theater Owners ("NATO") sought the government's interpretative guidance on the meaning of Section 4.33.3 through informal letters and, eventually, a formal rulemaking petition. In one letter, NATO stated that since the passage of the Americans with Disabilities Act in July 1990, there has been significant confusion with regard

to the ADA requirements for wheelchair seating in motion picture theaters. When the DOJ did not respond to that letter, NATO formally petitioned the DOJ for a rulemaking. The DOJ, however, refused to conduct a rulemaking proceeding until the Access Board amended ADAAG.

In addition to directing the DOJ to issue regulations to implement the ADA, Congress also required the DOJ to provide "appropriate technical assistance" to individuals or entities with rights or duties under this chapter." 42 U.S.C. § 12206(c)(3). Despite this statutory directive — and DOJ's knowledge since at least 1994 of the industry confusion over Section 4.33.3 — the DOJ at no time issued any written technical assistance pertaining to seating in movie theaters.[6] *See* deposition testimony of Ruth Lusher ("Lusher Dep."), dated May 29, 2002, at App. 4a. The DOJ did, however, set up a technical assistance telephone "Helpline" through which those governed by ADA regulations, including theater owners and operators, could obtain technical assistance on the meaning of Section 4.33.3 and the other provisions of ADAAG. *See* deposition testimony of Todd Anderson ("Anderson Dep."), dated February 8, 2002, App. at 13a; Lusher Dep., App. at 3a.

2. The DOJ's 1996 Helpline "Advice" to Hoyts About the Meaning of Section 4.33.3

When Hoyts first began designing and building stadium-style theaters in 1996, the only ADA-related resource available to Hoyts help interpret the meaning of Section 4.33.3 was the "Helpline" phone-in service provided by the

6. The DOJ and the Access Board did issue formal written technical assistance manuals in 1994. But the DOJ itself has stated that with respect to Section 4.33.3 these manuals addressed only sports arenas and other facilities where patrons are expected to stand, *i.e.*, not movie theaters.

DOJ for architects and other design professionals to obtain real-time architectural advice on how to comply with ADAAG. Lusher Dep. at 3a-4a. Hoyts' principal architect at that time was Arrowstreet, Inc. ("Arrowstreet"), which designed many of Hoyts' earliest stadium-style theaters. On behalf of Hoyts, Arrowstreet hired a code consultant firm, "Rolf Jensen Associates" ("RJA"), that provides guidance and technical advice about compliance with local and federal building-code regulations, including the ADA. *See* deposition testimony of Robert Carasitti, dated February 15, 2002 ("Carasitti Dep."), App. at 5a-6a.

In 1996, while working on the design of Hoyts Brassmill Connecticut theater complex, RJA's code consultant, Robert Carasitti, telephoned the "Helpline" to seek advice on where Section 4.33.3 required wheelchair seats to be placed in stadium-style theaters. Carasitti Dep., App. at 6a-7a. Mr. Carasitti's call was referred to Todd Anderson, a licensed architect employed by the DOJ whose duties including handling complex technical questions relating to ADA building requirements. Carasitti Dep., App. at 8a; Anderson Dep., App. at 13a-14a. Anderson told Carasitti that if Hoyts situated its wheelchair seats in the flat, *front section* of its proposed stadium-style theaters, those theaters would comply with Section 4.33.3. Carasitti Dep., App. at 10a; Anderson Dep., App. at 16a. Anderson testified that the advice he gave Carasitti was "consistent" with the advice about Section 4.33.3 that he was providing to the public generally at the time. Anderson Dep., App. at 16a. Mr. Carasitti relied upon his discussion with Anderson in advising Arrowstreet that their stadium theater designs for Hoyts complied with Section 4.33.3. Carasitti Dep., App. at 11a.

3. The DOJ's 1998 Litigation Interpretation of Section 4.33.3 in *Lara v. Cinemark*

Two years later, in July 1998, the DOJ commenced its litigation crusade against stadium theater owners, and began to assert very different interpretations of Section 4.33.3. The first such action was *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), in which the DOJ filed an *amicus curiae* brief on July 15, 1998. Regal Cinemas Inc., Petition for a Writ of *Certiorari* ("Cert. Petition") at 7. In that brief, the DOJ stated *for the first time* that the term "lines-of-sight" as used in Section 4.33.3 required that "wheelchair seating locations . . . be provided lines of sight in the stadium seats within the range of viewing angles offered to most of the general public *in the stadium seats, adjusted for seat tilt.*" Pet. App. at 73a-84a. In other words, contrary to the advice Hoyts received over the DOJ Helpline in 1996, the DOJ took the position in July 1998 that Section 4.33.3 required movie-theater operators to locate wheelchair seating within a certain part of the "stadium" section of their theaters.[7]

By the time the DOJ first announced its position in the July 1998 *Lara* brief, however, *over 90%* of all the Hoyts stadium-style theaters were already built or under construction.

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7. After the government filed an *amicus* brief in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), Anderson changed his "Helpline" advice. Anderson Dep., App. at 19a.

4. The Access Board's Response to the DOJ's *Lara v. Cinemark* Interpretation of Section 4.33.3

Prompted by the DOJ's litigation position in *Lara*, in November 1999 the Access Board said it was considering modifying Section 4.33.3 to include specific requirements in the final rule consistent with the DOJ's more recent interpretation of Section 4.33.3 in the context of stadium-style movie theaters. ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,277 (Nov. 16, 1999) (codified at 36 C.F.R. pt. 1190 & 1191). 64 Fed. Reg. at 62,278 (emphasis added). Despite the DOJ's new litigating position on the meaning of Section 4.33.3, however, the Access Board did not issue any revision to Section 4.33.3 at that time.

In April 2002, the Access Board finally proposed an extensive revision to Section 4.33.3. The April 2002 proposed revision would require that "wheelchair spaces shall be dispersed and *shall provide spectators in wheelchair spaces with a range of seating locations and viewing angles substantially equivalent to, or better than, the range of seating locations and viewing angles available to all other spectators*." Draft Final ADA and ABA Accessibility Guidelines, April 2, 2002, App. at 21a (emphasis added). The Access Board's 2002 draft regulation, however, *still* has not been enacted into law.

5. The DOJ's Continually-Changing Interpretations of Section 4.33.3 in *U.S. v. Hoyts*

In December 2000, the DOJ commenced the *U.S. v. Hoyts* action.[8] In that action, the DOJ presented various — and often conflicting — interpretations of what Section 4.33.3 means. The DOJ's interpretation of Section 4.33.3 changed *at least four times* in *U.S. v. Hoyts* from commencement of expert discovery to the present.

During expert discovery, the DOJ unveiled its first theory of the meaning of Section 4.33.3. Based on the report of the DOJ's architectural expert, Robert Luchetti, the DOJ asserted that a seat or viewing position complies with Section 4.33.3 if it complies with a four-pronged test Luchetti developed during the litigation: (i) the *"25% - 75% test"* — which a theater will "fail" if the seated eye height from the wheelchair seat locations is not within the 25% to 75% vertical range of seat rows offered; (ii) the *"vertical viewing angle test"* — which a theater will "fail" if the vertical viewing angle from the wheelchair seat locations is greater than 35 degrees; (iii) the *"viewing angle/isodeformation test"* — which a theater will "fail" if certain viewing angle distortion criteria

8. Also named in that consolidated action was National Amusements, Inc., which operates the National theater chain. At about the same time, the DOJ commenced two other direct actions against stadium-style movie-theater owners in *United States v. AMC Entertainment, Inc.*, No. CV 99-01034 FMC(SHX) (C.D. Cal.) and *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705 (N.D. Ohio). The DOJ also appeared as an *amicus* at the appellate level in two additional suits brought by private plaintiffs, *Stewmon v. Regal Cinemas, Inc.*, No. 01-35554 (9th Cir.) (*i.e.*, this case) and *Susan Meineker and Sybil McPherson v. Hoyts Cinemas Corporation*, No. 1:98-CIV-1526 (DNH/DRH) (N.D.N.Y.) (*i.e.*, the other action involving Hoyts).

are not met for each wheelchair seat location; and (iv) the *"maximum distance from the screen test"* — which an auditorium will "fail" if the wheelchair seat locations do not fall within a 30-degree maximum horizontal subtended viewing angle. Plaintiff's First Supplemental Response to Defendants' First Set of Interrogatories, App. at 23a; Government's Expert Architectural Report, by Robert Luchetti Associates, Inc., dated March 15, 2002, App. at 24a-25a.

The four-pronged Luchetti test was very onerous, to put it mildly. More than 70% of all the *general, non-wheelchair seats* at Hoyts theaters failed Luchetti's test. Expert Report of John P.S. Salmen, AIA, dated April 29, 2002, App. at 26a-27a. *In certain Hoyts theaters, every seat in the theater failed to satisfy Luchetti's test. Id.*

One theater industry expert testified in *U.S. v. Hoyts* that almost every one of the thousands of stadium theaters in the United States would fail Luchetti's test. Expert Report of John Wayne Anderson, App. at 28a-29a.

The DOJ belatedly recognized that a test for compliance with Section 4.33.3 that "flunked" 70% of all *general seats* in Hoyts theaters — and *every seat in some theaters* — would never be accepted by a Court. Thus, after expert discovery closed, the DOJ announced a second theory — the "continuum theory" — in a supplementary interrogatory response. Plaintiff's Second Supplemental Response to Defendants' First Set of Interrogatories, App. at 31a-34a. This theory, while still based on Luchetti's tests, was also based on the judgment of the DOJ's trial counsel. Using its new theory, the DOJ classified Hoyts theaters into two lists: those as to which it intended to pursue a remedy at trial and those

it did not. *Id.*[9] The DOJ did not explain how it arrived at the "continuum" theory; the DOJ stated only that it had placed all Hoyts theaters on a continuum from "best to worst" based upon a "comparative analysis" of Luchetti's findings. *Id.* The DOJ did not disclose the standards used by its trial counsel in deciding where the dividing line was between passing and failing the "continuum test." *Id.*

The district court decision in *U.S. v. Hoyts* summarily rejected both DOJ's Luchetti-based standards as "confusing" and "absurdly demanding." *United Sates v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 82, 87 n.12 (D. Mass. 2003). Instead, the district court adopted its *own* test. Under the district court's "somewhere-in-the-stadium" test, wheelchair seating had to be somewhere in the stadium, meaning, according to the district court, that it had to be situated on risers of steps of no less than 12 inches high. *Id.* at 78, 90-91.[10]

The DOJ filed its cross appeal to the First Circuit in *U.S. v. Hoyts* before the *Stewmon* decision was issued. In that cross appeal, the DOJ initially embraced the district court's new theory as its own. *See* letter from Gregory Friel, to defendants' counsel, dated June 17, 2003, App. at 36a. But in its First Circuit brief filed in October 2003 — after *Stewmon* was handed down — the DOJ abandoned all its

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9. Of course application of "continuum" test to Hoys and National's theaters produced significantly different pass-fail results, but defendants could not decipher — and the DOJ never revealed — the *standards* by which the different results were obtained.

10. The district court also found, however, that because the DOJ had been "lethargic in its rulemaking capacity," its ruling would apply prospectively only. *Id.* at 92-93.

prior interpretations of Section 4.33.3 and parted ways even with the *U.S. v. Hoyts* district court.[11] It adopted a *fourth* interpretation of Section 4.33.3 for use in its First Circuit brief. The DOJ now said that Section 4.33.3's comparable-lines-of-sight provision requires that wheelchair users be provided lines of sight "within the range of viewing angles offered to most patrons in the theater." *See* Brief for the United States as Appellees/Cross-Appellant, dated October 2, 1998, in *United States v. Hoyts Cinemas Corporation*, Nos. 03-1646, 03-1787, 03-1808 (1st Cir.), App. at 37a.

It is hardly a coincidence that this latest DOJ interpretation of Section 4.33.3 was also the one that had just been adopted in August 2003 by the majority in *Stewmon*. The majority in *Stewmon* found that the interpretation of Section 4.33.3 advanced by the DOJ in that case was reasonable and entitled to deference. *Stewmon*, 339 F.3d at 1132, Pet. App. at 15a-16a. Given the DOJ's constantly shifting interpretations of this regulation, however, *Stewmon's* deference to the DOJ is plainly unwarranted.[12]

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11. The DOJ agreed with Hoyts position in its appellate brief that the district court's "somewhere-in-the-stadium" test must be vacated and remanded for application of the "correct" interpretation of Section 4.33.3.

12. The DOJ's interpretation of Section 4.33.3 has been erratic and inconsistent not just in its litigation against Hoyts, but also in the other stadium-theater actions it commenced or joined. In the *Lara* district court, the DOJ first maintained that "wheelchair seating locations . . . be provided lines of sight in the stadium seats within the range of viewing angles offered to most of the general public *in the stadium seats, adjusted for seat tilt.*" Brief of *Amicus Curiae* United States on Summary Judgment Issues at 4, 8-9, *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (Cont'd)

B. The DOJ's Flip-Flopping Construction Of Section 4.33.3 Demonstrates Why Deference Is Inappropriate Here

The facts here demonstrate that the government's recent approach to Section 4.33.3 has been derived from litigation strategy, not from a "fair and considered" interpretation of the regulation. Hoyts has lived through all the DOJ's interpretations of Section 4.33.3 — first the one provided to Hoyts by the DOJ's Helpline architect in 1996, later the one set forth in the *Lara amicus* brief in 1998, and later still, the rapidly-shifting interpretations adopted by the DOJ in its attempt to win the *U.S. v. Hoyts* case. The DOJ's various interpretations all conflict with each other. None of them are derived from the plain text of the regulation; indeed, if they had been, it is inconceivable that an *entire industry* would have designed and built *thousands* of theaters that do not comply with the DOJ's current views of Section 4.33.3.[13]

(Cont'd)
(W.D. Tex. Aug. 21, 1998), Pet. App. at 73a-74a. Thereafter, the DOJ argued to the Central District of California that wheelchair seating locations must provide "a line of sight that approaches an optimal viewing zone." *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1106 (C.D. Cal. 2002).

13. The Access Board itself acknowledged the DOJ's early litigation interpretation and chose not to codify it. *See* Cert. Petition at 8. More recently, the Access Board promulgated a *draft* regulation that appears quite similar to the DOJ's most recent construction of the regulation. That draft, however, has not been, and may never be, adopted into law. Draft Final ADA and ABA Accessibility Guidelines, April 2, 2002, App. at 20a-21a.

Accordingly, the DOJ's most recent construction of the regulation is not entitled to deference. *Bowen*, 488 U.S. at 213 (no deference where government position merely a "convenient litigation position); *Callaway*, 231 F.3d at 132-33 (no deference since Commissioner had "taken inconsistent positions before, during and after [the] litigation"); *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (counsel's "simultaneous advocacy of several different positions" strongly suggested that Secretary never grappled with "the conundrum posed by the regulation's clear ambiguity"); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (deference to an agency's amicus brief "cannot be very great" when agency "has unaccountably failed to address a fundamental issue on which [its] brief takes a radical stance."); *Malcomb v. Island Creek Coral Co.*, 15 F.3d 364, 369 (4th Cir. 1994) ("agency's record of unexplained inconsistent interpretation is particularly egregious"). *See* Cert. Petition at 21-22. *Stewmon*'s determination that the DOJ's current construction of 4.33.3 is worthy of deference must be set aside.

To grant judicial deference to the DOJ in the face of its years of waffling on the meaning of Section 4.33.3 would squarely violate the procedural safeguards for substantive rulemaking set forth in Administrative Procedures Act ("Act"). Under the APA, federal agencies like the DOJ must follow specific notice and comment rulemaking procedures before formulating substantive rules. If an agency interpretation is merely tactical, and is not subjected to notice and comment, a court has no choice but to "hold unlawful and set aside" the proposed construction as statutorily

unauthorized agency action. 5 U.S.C. § 706(2)(C)(D). *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996).

When applying *Auer's* "fair and considered judgment" test, therefore, courts have struggled to balance the rules of agency deference against these fundamental notice and comment precepts embodied in the APA. For example, the Seventh Circuit observed:

> though we know from *Auer* . . . that, in some circumstances at least, an agency's *amicus* brief is entitled to some deference, it cannot be very great when it is the brief of an agency that has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance.

Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588-89 (D.C. Cir. 1997)). *See also Akzo Nobel Salt, Inc.*, 212 F.3d at 1304-05; *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999). On the most fundamental level, a regulation must give notice of what is required and an agency interpretation of that regulation must be "ascertainably certain" from the regulation's plain language to be enforceable under the fair notice doctrine. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995). The decision below undermines these important principles and must be reversed.

CONCLUSION

Given the history of changing and conflicting interpretations of Section 4.33.3, both in direct communications with Hoyts before *Lara* and in litigation brought by the DOJ against Hoyts after *Lara*, the DOJ's current construction of Section 4.33.3 is neither fair nor reasonable. Where, as here, a new substantive rule masquerades as an agency interpretation, then the procedural safeguards of advance notice and opportunity for public comment are eliminated. The Ninth Circuit Decision in *Stewmon* should be reversed.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM TECHNICAL REPORT

Accessibility in Assembly Areas

Excerpts from Technical Report

Recommendations and Task Summaries

Prepared for:
The ACCESS BOARD
Julie Zirlin, Contract Officer
Contract Number QA92006001

Project Team:
Jon A. Sanford, Project Director
Michael Jones, Principal Investigator Task 1
Bettye Rose Connell, Principal Investigator Task 2

Center for Accessible Housing:
Ron Mace, Technical Advisor
Laura Nowak, Project Manager
Susan Auld, Research Assistant
Chris Butler, Research Assistant
Sharon Canter, Research Assistant

Adaptive Environments Center
Elaine Ostroff, Investigator
Soni Gupta, Project Associate
Ed Neubauer, Project Associate

The Center for Accessible Housing
North Carolina State University, School of Design,
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Appendix A

* * *

Finally, the research also uncovered a notable amount of divergence and confusion among facility managers, architects and individuals with disabilities in their interpretations of a number of key, if ambiguous, terms in ADAAG. These differences are suggestive of areas in which clarification, explication and education are needed. For example, the meaning of comparable sightlines seemed to vary significantly, depending on who you talked to. There also were differences in about the meaning of integrated or integral seating. Situations such as the above suggest the need for working operational definitions for presenting and discussing findings related to ambiguous concepts.

* * * *

APPENDIX B — EXCERPTS FROM VIDEOTAPE DEPOSITION OF RUTH LUSHER DATED MAY 29, 2002

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 00-12568-WGY

UNITED STATES OF AMERICA

Plaintiff,

v.

NATIONAL AMUSEMENTS, INC., and HOYTS CINEMAS CORPORATION,

Defendants.

Videotape Deposition of RUTH LUSHER

* * *

Q. When you say serve on the information line, you mean answering questions from the public as to what was required to be in compliance with accessibility requirements?

A. Yes. That's correct.

* * *

Appendix B

Q. If someone calls up the information line and says I want to know what's meant by the phrase lines of sight within 4.33.3, what should the person manning the line tell them?

A. They should go over the language in the context in which it's written, and if it's related to a stadium, it would depend. If it's relating to a stadium, we have a specific technical assistance piece that addresses that, what it means in a stadium where you have spectators that are likely to jump up and down in front of you or stand the whole game.

Q. What if it relates to a stadium style movie theater?

A. With regard to stadium style movie theaters, we don't have any specific technical assistance material on, that address that specific issue.

* * *

Q. Has the technical assistance line received calls asking what the phrase lines of sight means as used in the context of Section 4.33.3?

A. Yes. We have.

Q. And has, have you received those calls where the context of the call relates to a movie theater?

A. Yes. We have.

* * * *

APPENDIX C — EXCERPTS FROM DEPOSITION OF ROBERT CARASITTI DATED FEBRUARY 15, 2002

In The Matter Of:

United States of America v. Hoyts Cinemas Corporation, et al.

Robert Carasitti
February 15, 2002

* * *

Q: Yes. And if they changed it as you stayed there, please describe that.

A: Well, in 1991, as I mentioned, I was an intern or entry-level engineer, where for the first half of that year I worked under a senior consultant, gaining experience in dealing with clients and project work in general.

After six months, I started managing projects on my own. When I returned in '93, I was in fact hired as what they considered an associate consultant, associate engineer. That was specifically because you can't be a consultant until you have your engineering license.

In that capacity I worked with clients, including building owners, architects, and I also worked with authorities having jurisdictions, such as building and fire officials, to develop or assist in consultation to design buildings that complied with applicable building, fire and life safety codes.

Q: That was a good description. Is that a description of the business of Rolf Jensen?

A: Yeah. The only thing I would add to that is that Rolf Jensen also does a lot of design work, specifically in terms of sprinkler systems, fire alarm systems work.

* * *

Q: Am I correct that at some point in 1996 you worked with Arrowstreet in connection with the building and design of Hoyts stadium thaaters?

A: Yes.

* * *

Q: Do you recall whether you took any steps in April of 1996 to try to clarify what the ADA required with respect to the placement of wheelchair sets at the Brassmill complex?

A: Yes.

Q: What is your best recollection of what steps you took?

A: I called the Department of Justice and spoke with a person there.

Q: Could I just ask, before we get into that, what was it that prompted you to call the Department of Justice? Was that following a discussion at RJA? What brought you to that point?

A: I don't specifically recall the exact reason for prompting the call, but it certainly had to do with the question of where the specific locations for wheelchair viewing positions needed to be.

Q: Under Section 4.33.3?

A: Yes.

Q: Before you called, am I correct that you looked at 4.33.3, and did you make any effort to try to figure out, based on the language of the standard, where the wheelchair seats would have to be?

MS. DEPEW: Objection.

A: Yes.

Q: And were you able to do that?

A: I came up with a conclusion of my own, yes.

Q: And what was the conclusion that you came up with before you made the call?

A: That in cinemas with less that 300 seats, only – one location was required in terms of wheelchair viewing position, location. The number of wheelchair location was dependent — the number of wheelchair populations was dependent on the number of seats in particular.

Appendix C

Q: After you came to that conclusion, was there any reason that you went on to call the Justice Department?

A: Yes. I mean, it was my opinion. But other than my reading of 4.33.3, I was seeking some type of confirmation.

* * *

Q: Could you describe this memo is and how it relates to your telephone call to the DOJ?

A: I called the DOJ and asked a general question about wheelchair — 4.33.3 wheelchair distribution and the application of 4.33.3. And this is a record of that conversation from my recollection.

Q: Did Mr. Andersen answer the phone when you called or were you referred to him?

A: I don't recall how I wound up at Mr. Andersen, no.

Q: Do you recall going through more than one person?

A: I don't recall.

* * *

Q: What is your best recollection of the conversation that took place on April 17,1996, between yourself and Mr.Andcrsen? What did he say to you and what did you say to him?

Appendix C

A: My recollection is that I posed the question of 4.33.3 in terms of what it was asking for relative to the distribution, the location of wheelchair viewing positions, the number of locations that were actually required for cinemas based on number of seats.

And Mr.Andersen — we seemed to have focused on the 300 plus seat cinema scenario, and that in that particular case, you know, there were six seats required, as opposed to the number that we were proposing on a certain design or two, and that was more than we needed to do. And that the location — there was no specifics as to where those needed to be located, other than to be in the seating arrangement of the cinema.

Q: Are those the views of Mr. Andersen that you're recounting?

A: That's my recollection of the conversation.

Q: Did you describe to Mr. Andersen that the theater you were talking about had a mezzanine? It wasn't just one level?

A: The theater itself was one box. The mezzanine was the projection mezzanine. And you could access the seating from the projection mezzanine. But in my personal opinion, it was not a mezzanine as defined by building code. It was not additional floor area above floor area or below, as far as the theater box was concerned.

Appendix C

Q: I don't want to start to trip over your definition of mezzanine. Did you explain to him that there were seats that went up on risers?

MS. DEPEW: Objection.

A: Yes.

Q: And that the locations of the wheelchair seats that were anticipated in the front section were not on the risers, but were on a flat section of floor?

A: I believe so, yes. We talked about a general layout of a cinema in terms of what — the question was framed in general. And we did talk about the seating arrangement in terms of it having, you know, distinctive, you know, number of rows, number of seats. And that there were seats in stadium-style and sloped floor.

Q: Do you recall whether you were using the term "stadium-style" at that point or "stadium"?

A: I believe we were using the term "tiered."

Q: And is it your recollection that Mr. Andersen said that it was satisfactory under Section 4.33.3 to locate the wheelchair seats in the front section of the theater?

MS. DEPEW: Objection.

A: Yes, it is my recollection.

* * *

Appendix C

Q: The sentence, "Though this may comply with ADA for under 300 seats, they feel it doesn't comply with MAAB." Was it the general feeling of the professionals working on the Hoyts stadium theaters in July of '96 that compliance with the ADA would be achieved by putting wheelchair seats in only one location for theaters under 300 seats?

MS. DEPEW: Objection.

A: Yes.

Q: I asked that question using the noun "feeling." Would your answer be the same if I said, was it the belief of those professionals at that time?

MS. DEPEW: Objection.

A: It was my opinion that that, in fact, was the case; that under 300 seats, one wheelchair location for the purposes of providing wheelchair viewing locations was acceptable. And that others had shared that opinion.

Q: Based on your conversation with Todd Andersen, did you have an understanding that Mr. Andersen at the DOJ shared that opinion?

MS. DEPEW: Objection.

A: Yes.

* * * *

APPENDIX D — EXCERPTS FROM DEPOSITION OF TODD ANDERSEN DATED FEBRUARY 8, 2002

In The Matter Of:

United States of America v. Hoyts Cinemas Corporation, et al.

Todd Andersen
February 8, 2002

* * *

Q: That's an architectural firm?

A: It is. Second or third oldest in the city. In '87 Eisenberg sold his partnership to Haven. I chose not to work for Haven. Eisenberg and I and one other started our own firm in code consulting, '87 to '94; I was a partner in a firm that was variously named Eisenberg Associates and then later on Eisenberg, Andersen & Spinetto.

In '94 each of the three of us had new directions in our lives that we wished to pursue, and I became aware of a position at the Department of Justice that looked like it might be interesting. I applied and was accepted.

Q: And what was that position?

A: I forget what the heck they had on their job list, but to me it was architect.

Appendix D

Q: Was it for any particular section or division of the Department of Justice?

A: Civil Rights Division, Disability Rights Section. When I joined, it was not called the Disability Rights Section. I forget what it was called. It changed names in '96, I believe.

I stayed there through September of '98, moved back to the private sector with a firm — with whom I'm now employed, Rolf Jensen, R-o-l-f, Jensen & Associates.

* * *

Q: Does the DOJ — during the time that you were there, did it operate a technical assistance hot line?

A: They called it a help line, but they do.

Q: What was that?

A: As stated, a source of advice with respect to the Americans with Disabilities Act.

Q: And is that what the technical advisors did, is they manned that line?

A: They were the front line of that whole process. It was more than just them.

Q: Who was the backup? You say it was more than just them. Who else was involved?

Appendix D

A: There was an apparatus that created publications. There were other kinds of materials made available through typically the website, having to do with settlement agreements to which the section had entered.

Q: What was your role as a backup to these people?

A: When a question would come in that was more technical than they felt comfortable talking about, having to do with the built environment, I would get somewhere between — I don't know — 40 and 80 calls a week possibly bounced to me.

* * *

Q: Do you ever recall during that time period telling anybody who called in and asked you questions about 4.33.3's application to a stadium-style theater, that the wheelchair seats could be located in the sloped or flat section in the front part of the theater?

MR. PINEAULT: Would you read that question back, please.

*(Question read)

A: Yes.

Q: Do you have any specific recollection of the discussion on that subject?

A: I do not have a specific recollection. I've been shown a document purporting to record such a discussion. And this would have to be understood in the context of rooms less than 300 seats.

Q: Do you know a gentleman named Robert Carasitti or Bob Carasitti?

A: I do.

Q: Do you ever remember having any discussions with Bob Catasitti on the technical assistance hot line or at least on a call referred to you from the technical assistance hot line?

A: A couple. In detail, no. But I remember that Bob called me a number of times.

Q: Did you know Mr. Carasitti before getting those calls?

A: No. In fact, I've never met him face-to-face.

Q: Do you know whether he is affiliated with Rolf Jensen?

A: No. He's now in one of our competitor's firms. He's still in New England.

Q: Did there ever come a time when you had occasion to talk to Mr. Carasitti apart from the discussions that you had on these technical assistance hot line calls?

A: Subsequent to being involved with the DOJ, yes.

Q: When you came to Rolf Jensen?

A: That's correct.

Q: During that same time period, did you have any discussions with anybody calling in who asked you about the application of Section 4.33.3 to a stadium-style theater that was built for more than 300 people?

A: Yes.

Q: And with respect to those larger theaters, do you recall whether you ever said that it was acceptable to put the wheelchair locations in the front or sloped section — I'm sorry, in the sloped or flat section in the front of the theater, together with a few seats in the rear of the theater?

A: I don't remember that specifically as I sit here, but it would have been consistent.

Q: With the advice you were giving at that time?

A: Correct.

Q: Did there come a time — strike that. I would like to ask one more question on this line.

Did you ever give advice to these people to the effect that the stadium-style theater wheelchair seats might be located in the first row and still comply with 4.33.3?

A: For small rooms?

Q: For small theaters.

A: I believe I did, yes.

Q: When you say "small theaters," do you mean theaters for less than 300 patrons?

A: Correct.

Q: Did there ever come a time when your advice with respect to 4.33.3's application to stadium-style theaters changed?

A: It would have been in '97. It would have been around the time of the Florida charrette.

Q: Can you describe what the Florida charrette was?

A: An attempt by advocates to meet with the movie industry and the movie industry's designers to see what could be done about creating better seats for wheelchair spaces in stadium-style cinemas.

Q: One more question on theaters for more than 300 patrons.

Can you tell me — you said that, in response to one of my questions, that you gave advice that was consistent with the way I had asked the question.

Appendix D

What is your recollection of the advice that you gave with respect to where you put the wheelchair seats in a stadium-style theater that is being built for more than 300 people? And this is in the time frame of '95,'96.

A: Again, I don't remember a specific discussion, but it would have been something to the effect of "You've got to put them in more than one place. Do not just imagine that back left and back right suffices. If you're going to put some in the back, then try and get some towards. the middle or front of the room."

Q: So you could not have them in just one location?

A: That's correct. That's this essence of dispersion.

Q: And with respect to smaller theaters, those under 300, you could have them in one location?

A: That's correct.

* * *

Q: By the way, the date of the second page of this exhibit is September 12,'97.Tbe date of the first page is a little blurry. It could be December 13 or 17 — I can't tell — 1997. So let me just rephrase the question here.

Do you recall speaking to Bob Carasitti around September 12,1997, with respect to a changed view that you were conveying concerning 4.33.3 subsequent to the Florida charrette?

A: Not with great specificity, but I do remember we had the discussion, correct.

* * *

Q: Did there come a time when the advice that you were giving with respect to Section 4.33.3's application to stadium-style theaters changed yet again?

A: Yes.

Q: When was that?

A: In 1998, summer, early autumn, somewhere in that area.

Q: And what was the reason that the advice changed again?

MR. PINEAULT: At this point if that reason pertains to internal DOJ or Access Board communications, I instruct the witness not to answer.

A: It had to do with a brief that was filed.

* * * *

APPENDIX E — DRAFT FINAL ADA AND ABA ACCESSIBILITY GUIDELINES DATED APRIL 2, 2002

Draft final ADA and ABA Accessibility Guidelines
April 2, 2002

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1190 and 1191

* * *

Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines

AGENCY: Architectural and Transportation Barriers Compliance Board.

* * *

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board is revising and updating its accessibility guidelines for buildings and facilities covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). These guidelines cover new construction and alterations and serve the basis for enforceable standards issued by other Federal agencies. The ADA applies to places of public accommodation, commercial facilities, and State and local government facilities. The ABA covers facilities designed,

built, altered, or leased with Federal funds. As a result of this revision and update, the guidelines the ADA and ABA are consolidated in one Code of Federal Regulations part.

* * *

221.2.3 Lines of Sight and Dispersion. *Wheelchair spaces* shall provide lines of sight complying with 802.2 and shall comply with 221.2.3. In providing lines of sight, *wheelchair spaces* shall be dispersed and shall provide spectators in *wheelchair spaces* with a range of seating locations and viewing angles substantially equivalent to, or better than, the range of seating locations and viewing angles available to all other spectators.

* * * *

APPENDIX F — PLAINTIFF'S FIRST SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES DATED MAY 6, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 00-12567-WGY

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOYTS CINEMAS CORPORATION and
NATIONAL AMUSEMENTS, INC.,

Defendants.

PLAINTIFF'S FIRST SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

* * *

Interrogatory 4

Identify each auditorium owned and/or operated by National Amusements and Hoyts that you contend violates Section 4.33.3, and, separately for each such auditorium, as of the date you respond to this interrogatory and as of the date of any supplemental response to this interrogatory:

(a) state the basis for that contention;

(b) stale what remedial efforts you contend National Amusements or Hoyts would need to make in order to comply with your purported interpretation of Section 4.33.3; and

(c) state your estimate of the cost of those remedial efforts.

* * *

Response

. . . The United States incorporates by reference the Government's Expert Architectural Report of Robert Luchetti Associates, Inc. dated March 15, 2002 ("Architectural Report"). In volumes 2 and 3 of the Architectural Report, Mr. Luchctd analyzes the wheelchair seat locations in each stadium-style movie theater owned and/or operated by the defendants for which DOJ possesses a copy of architectural plans. DOJ contends that if the Architectural Report states that a wheelchair seat location is not acceptable, and the minimum required number of wheelchair seats within that auditorium are not acceptable, that theater violates Standard 4.33.3.

* * * *

APPENDIX G — GOVERNMENT'S EXPERT ARCHITECTURAL REPORT DATED MARCH 15, 2002

U.S. v. Hoyts, National Amusements, CA-00-12567-WGY

Government's Expert Architectural Report

Volume 1

Sections I, II, III, IV, V
Appendices A, B, C, D, E

Robert Luchetti Associates, Inc.
15 March 2002

* * *

Quantitative Evaluation Criteria:

To complete a factual quantitative analysis of each auditorium in our sample group, based on the standards and guidelines used in the film presentation industry, we focused our five original questions into four specific performance evaluation criteria for the wheelchair seat locations in each existing auditorium. The criteria are derived from the theater design standards and guidelines set forth in Part B, above.

We used the following four evaluation criteria:

1. whether the maximum vertical viewing angle is less than or equal to 35°;

2. whether the horizontal subtended viewing angle is equal to or greater than 30°;

3. whether the viewing angle distortion falls within Iso-Deformation Zones I and II; and

4. whether the vertical seated eye height falls within 25 percent to 75 percent of the range of seated eye heights for other seats within the same auditorium.

* * *

The auditorium will "pass" the seated eye height criterion if the seated eye height from the wheelchair seat locations is within the 25% to 75% vertical range offered. The auditorium will "fail" if the seated eye height from the wheelchair seat locations is not within the 25% to 75% vertical range offered.

The auditorium will "pass" the vertical viewing angle criterion if the vertical viewing angle from the wheelchair seat locations is equal to or less than 35°. The auditorium will "fail" if the vertical viewing angle from the wheelchair seat locations is greater than 35 degrees.

The auditorium will "pass" the view angle distortion criterion if the wheelchair seat locations are within the zone I and zone II of the iso-deformation zones. The auditorium will "fail" the view angle distortion criterion if the wheelchair seat locations are not within the zone I and II of the iso-deformation zones.

The auditorium will "pass" the maximum distance from the screen criterion if the wheelchair seat locations fall within a 30 degree maximum horizontal subtended viewing angle. The auditorium will "fail" if the wheelchair seat locations do not fall within this 30 degree angle.

* * * *

APPENDIX H — EXPERT REPORT OF JOHN P.S. SALMEN, AIA DATED APRIL 29, 2002

Expert Report of John P.S. Salmen, AIA

Date: April 29, 2002

Re: Evaluation of the Government's Expert Architectural Report by Robert Luchetti, addressing compliance of certain Hoyts' theater complexes with Section 4.33.3 of the Americans with Disabilities Act Standards for Accessible Design — 28 CFR Part 36 revised as of July 1, 1994 (the ADA Standards).

* * *

c. Over 70% Of The Total Number Of All Seats In Hoyts Theaters Do Not Pass Luchetti's Criteria For Identifying "Acceptable" Seats

Luchetti's criteria are not the basis upon which stadium theaters have been designed or constructed in the U.S. since they were first created in the mid 1990's and are not the criteria used by Hoyts architects to create seating that satisfies the viewing public. A graphic analysis of the theaters utilizing the plans, sections and data supplied in Luchetti's report, shows that only 29.50% of the number of *total seats* in the theaters meeting all four of his criteria[1]. By way of comparison 20.97% of the *wheelchair accessible positions*

1. Exhibit B — Comparison of Analysis Systems The percentage of seats passing all four Luchetti tests ranged from 0% of the seats in the Waterbury theaters # 2 & #11 to 72% of the seats in the Providence theater #15.

"pass" his (or the Cremieux) criteria. Luchetti's four part analysis, therefore, renders the vast majority *(i.e.,* over 70%) of all seats in the theaters (including both general seats and wheelchair seats) to be unacceptable in one or more ways. If all wheelchair viewing locations were to be situated so as to comply with Luchetti's analysis, such preferred wheelchair seating which would end up being better, according to Luchetti, than almost all general seating in most theaters and every seat in some theaters (see Hoyts Waterbury CT theaters # 2 & #11 where **no seats** met the 4 tests.) The ADA, however, requires only that lines of sight afforded to wheelchair patrons be "comparable to" general seating.

* * * *

APPENDIX I — EXPERT REPORT OF J. WAYNE ANDERSON

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 00-12567-WGY

UNITED STATES OF AMERICA,

Plaintiff,

-against-

HOYTS CINEMAS CORPORATION and
NATIONAL AMUSEMENTS, INC.,

Defendants.

EXPERT REPORT OF J. WAYNE ANDERSON

* * *

23. I understand that the great majority of all seats available to the general public in Hoyts' theaters "fail" one or more of Mr. Luchetti's tests. This is hardly surprising, since in my opinion the vast majority of all seats in stadium theaters throughout this country would fail one or more of Mr. Luchetti's tests because such theaters were not designed to comply with Mr. Luchetti's four tests. Mr. Luchetti's analysis seems to confirm that Hoyts' wheelchair seats are comparable to the other general seats because it shows that

the wheelchair seats are within the 70% majority of seats that are not "acceptable" according to Mr. Luchetti because they do not pass one or more of his tests.

* * * *

APPENDIX J — PLAINTIFF'S SECOND SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 00-12567-WGY

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOYTS CINEMAS CORPORATION and
NATIONAL AMUSEMENTS, INC.,

Defendants.

APPENDIX J — PLAINTIFF'S SECOND SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

* * *

Interrogatory 4

Identify each auditorium owned and/or operated by National Amusements and Hoyts that you contend violates Section 4.33.3, and, separately for each such auditorium, as of the date you respond to this interrogatory and as of the date of any supplemental response to this interrogatory:

(a) state the basis for that contention;

(b) state what remedial efforts you contend National Amusements or Hoyts would need to make in order to comply with your purported interpretation of Section 4.33.3; and

(c) state your estimate of the cost of those remedial efforts.

* * *

Response

. . . The United States has listed below, by defendant, the stadium-style auditoriums that violate Standard 4.33.3 for which the United States intends to pursue remedies during the trial of this action:

* * *

Hoots Cinemas Corporation

Branford, CT auditoriums 1-12

Enfield, CT auditoriums 1-12

Simsbury, CT auditorium 7

*Waterbury, CT auditoriums 1-12

Bellingham, MA auditoriums 1-14

Appendix J

Hyannis, MA auditoriums 1, 10-12

Marlboro, MA auditoriums 1, 2, 6-10, 13-15

Westboro, MA auditoriums 1-12

BWI; MD auditoriums 1-14

Bowie, MD auditoriums 1-14

Germantown, MD auditoriums 7, 14

Hunt Valley, MD auditoriums 1-12

Pennsauken, NJ auditoriums 1-10

Binghamton, NY auditorium 6

Cicero, NY auditoriums 4, 5, 13

Greece Ridge, NY auditoriums 1-12

Guilderland, NY auditoriums 1-18

Lake Ronkonkoma, NY auditoriums 1-9

Hazelton, PA auditoriums 1-10

Saucon Valley, PA auditoriums 1-10

Providence, RI auditoriums 1-3, 8-12, 15, 16

Appendix J

Manassas, VA auditoriums 2, 4, 5, 7, 9, 10

Potomac Yards, VA auditoriums 1-16

Martinsburg, WV auditoriums 1-10

The United States has listed, below, by defendant, the stadium-style auditoriums for which the government does *not* intend to pursue remedies at trial. An auditorium's inclusion on the following list does not necessarily mean that the auditorium complies with Standard 4.33.3. It signifies only that the United Stags has determined not to pursue remedies for the listed auditoriums at trial.

* * *

Hoyts Cinemas Corporation

Simsbury, CT auditoriums 1-6, 8

Hyannis, MA auditoriums 2-9

Marlboro, MA auditoriums 3-5, 11, 12

Germantown, MD auditoriums 1-6, 8-13

Hamilton Township, NJ auditoriums 1-14

Binghamton, NY auditoriums 1-5, 7-12

Cicero, NY auditorium 3

Appendix J

Dauphin County; PA auditoriums 1-14

Providence, RI auditoriums 4-7, 13, 14

Manassas, VA auditoriums 1, 3, 6, 8, 11-14

(a) . . . .

For each of the stadium-style auditoriums listed above as to which the United States has stated its intention to pursue a remedy at trial, the lines of sight provided to patrons in the wheelchair locations are not comparable to the lines of sight afforded to members of the general public. Rather, when evaluated pursuant to the methodology and criteria set forth in the Architectural Report, the wheelchair locations in each of the listed auditoriums provide lines of sight that are inferior in quality to the lines of sight afforded from the majority of the other seats in the same auditorium. Put differently, if the seats in the listed auditoriums were placed on a continuum from best to worst in terms of the quality of the lines of sight, the wheelchair locations would fall on the "worst" end of the continuum.

* * * *

APPENDIX K — LETTER FROM GREGORY B. FRIEL TO MICHAEL J. MALONE AND JAMES R. CARROLL RE: CROSS-APPELLANT'S DESIGNATION OF APPENDIX CONTENTS DATED JUNE 17, 2003

U.S. Department of Justice

Civil Rights Division

Appellate Section - PHB
950 Pennsylvania Avenue, N. W.
Washington, DC 20530

June 17, 2003

BY FAX AND U.S. MAIL

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Re: *United States v. Hoyts Cinemas Corp. and National Amusements, Inc.*, No. 03-1808 (1st Cir.) (consolidated with Nos. 03-1646 and 03-1787) Cross-Appellant's designation of appendix contents

Appendix K

Dear Messrs. Malone and Carroll:

* * *

In order to assist you in deciding which items to include in your counter-designation of appendix contents, the United States notifies you that it presently intends to raise the following issue in its cross-appeal:

Whether the district court erred in holding that the Department of Justice's interpretation of Standard 4.33.3 could be applied - and thus relief would be granted — only with respect to stadium-style theaters built or refurbished on or after December 18, 2000, the date the United States filed its complaint in this case.

* * *

Sincerely,

Jessica Dunsay Silver
Principal Deputy Chief

s/ Gregory B. Friel
Gregory B. Friel
Attorney, Appellate Section
Civil Rights Division

APPENDIX L — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 2, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 03-1646, 03-1787, 03-1808

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v.

HOYTS CINEMAS CORPORATION; NATIONAL AMUSEMENTS, INC.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

EXCERPTS FROM BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

* * *

The Department of Justice has reasonably interpreted Standard 4.33.3 to require, *inter alia,* that a theater operator provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons in the theater.

* * * *

Supreme Court, U.S.
FILED
DEC 1 _ 2003
OFFICE OF THE CLERK

No. 03-641

In The Supreme Court of the United States

REGAL CINEMAS, INC. and
EASTGATE THEATER, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH,
and KATHY BRADDY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMC ENTERTAINMENT, INC. AND LOEW'S CINEPLEX ENTERTAINMENT CORPORATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI* AND PRELIMINARY STATEMENT[1]

Amici are owners and operators of "stadium-style" movie theaters. This innovation in theater design caught on in 1995 and, since then, *amici* have invested hundreds of millions of dollars building literally thousands of individual theaters employing this design.[2]

Like petitioner Regal Cinemas, *amici* are subject to and sought to comply with Section 4.33.3 of the ADA Accessibility Guidelines ("ADAAG"), 28 C.F.R. pt. 36, app. A, at 668-69 (2003), which requires that people with physical disabilities be provided wheelchair seating that is "an integral part" of the fixed seating plan with "lines of sight comparable to those for members of the general public." Section 4.33.3 also mandates, among other requirements, that the wheelchair seating "adjoin" an accessible exit route and that a companion fixed seat be provided next to each wheelchair seating area.

It is undisputed that neither the drafters of Section 4.33.3 nor the Department of Justice ("DOJ") officials who promulgated the regulation considered the application of this regulation to stadium-style movie theaters. It is also undisputed that although Title III of the ADA requires

---

[1] The parties have consented to the filing of this *amicus* brief. Pursuant to Rule 37.6 of the Supreme Court Rules, *amici* state that counsel for *amici* practice in the same law firm as counsel for Petitioners. *Amici* further state that, other than *amici* and their counsel, no person or entity made a contribution to the preparation of this brief.

[2] *Amicus* AMC Entertainment has constructed or acquired 113 stadium-style theater complexes in the United States, containing 2,125 movie screens. *Amicus* Loew's Cineplex Entertainment Corporation operates 44 stadium-style theaters in the United States, containing 728 movie screens.

DOJ to promulgate regulations and publish technical assistance manuals precisely so that builders will have detailed, authoritative notice of ADA requirements when designing structures subject to the Act's requirements for new construction, DOJ failed to provide any guidance suggesting the interpretation of Section 4.33.3 that it now seeks to impose retroactively on theater builders and owners.

Quite the opposite in fact. As late as March 1997, DOJ held a formal presentation for theater owners on the requirements of Section 4.33.3 and explicitly refused to take *any* position as to what the regulation requires with respect to the placement of wheelchair seating in the increasingly prevalent stadium-style theaters. *See United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1105 n.15 (C.D. Cal. 2002). DOJ's refusal to provide relevant pre-construction guidance on the meaning of Section 4.33.3 stands in sharp contrast to its willingness in other contexts to provide meticulously detailed guidance – specifying standards for matters such as the maximum thickness of carpet pile – upon which builders have been able to rely to meet ADA requirements. *See* ADA Accessibility Guidelines, Section 4.5.3, 28 C.F.R. pt. 36, app. A, at 605.

Faced with this lack of guidance from DOJ, *amici* sought to comply with the amorphous requirement that they provide "lines of sight comparable to those for members of the general public" by placing wheelchair seating at their stadium-style theaters solidly within the footprint of the theater seating plan in locations that assured an unobstructed view of the screen. *Amici* placed the wheelchair seats (for theaters with a capacity of under 300

persons)[3] generally in the front third of the auditorium. In most stadium-style theaters, this portion of the auditorium is built on a sloped floor or on modest risers, rather than on the steep risers used farther back because it is only towards the rear of the auditorium that the steeper slope is needed to provide lines of sight over forward sitting patrons. Although DOJ was fully aware of the boom in stadium-style theater construction, it expressly declined to take a position on the application of Section 4.33.3. Instead, it stood by silently while *amici* invested heavily in the building boom for stadium-style theaters, raising no challenge to *amici*'s reasonably held belief that their approach to wheelchair placement comported with the ADA.

DOJ's approach to Section 4.33.3 took an abrupt turn in 1998 when it filed an *amicus curiae* brief in support of a private litigant's challenge to the placement of wheelchair seating in stadium-style theaters. *See* Brief of *Amicus Curiae* United States on Summary Judgment Issues 4, 8-9, *Lara v. Cinemark, USA, Inc.*, No. EP-97-CA-502-H, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998). In that *amicus* brief, DOJ announced, for the first time, that, to comply with Section 4.33.3, theater owners had to place wheelchair seating in the stadium portion of each auditorium and, moreover, that the wheelchair seats must provide specific and (in the Department's subjective view) advantageous "viewing angles" to the screen.

---

[3] Section 4.33.3 requires that, in auditoriums containing more than 300 seats, wheelchair seating be offered in more than one location. 28 C.F.R. pt. 36, app. A at 668.

Having generated out of the blue in its *Lara amicus* brief a completely new approach to line of sight comparability under Section 4.33.3,[4] DOJ initiated a series of lawsuits against *amici* and others charging violations of several variants of its newly minted "viewing angle" requirement and seeking not just prospective remedies governing future construction, but also retrospective injunctive relief requiring the reconstruction of existing theaters.[5] Although more than five years have passed since DOJ announced its position on line of sight comparability, it has yet to amend Section 4.33.3 through formal notice and comment requirements. Nor has DOJ issued technical assistance on this point. Instead, it has charted a post hoc regulatory course entirely through litigation.

REASONS FOR GRANTING THE WRIT

The Justice Department's lawsuits, as well as its *amicus* pleadings in private actions, have resulted in judicial chaos with respect to two issues of broad significance: (1) what does Section 4.33.3 require with respect to the placement of wheelchair seating; and (2) should courts

---

[4] The novelty of DOJ's approach is powerfully confirmed by the fact that, in 1999, the Architectural and Transportation Barriers Compliance Board (which provides guidelines for ADA compliance and which drafted the language that DOJ promulgated as Section 4.33.3) published a Notice of Proposed Rulemaking inviting comment on whether Section 4.33.3 should be amended to include the "viewing angle" requirement that DOJ was advocating in litigation. *See* 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999).

[5] *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003), *appeals pending*, Nos. 03-1787, 03-1808 (1st Cir.); *AMC Entertainment*, 232 F. Supp. 2d 1092; *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, 11 (N.D. Ohio Nov. 19, 2001), *rev'd and remanded*, No. 02-3100, 2003 WL 22508500 (6th Cir. Nov. 6, 2003).

defer to an agency's post hoc elaboration of a vague regulatory standard, announced by *amicus* brief, where enforcement of the newly announced requirements would frustrate Congress' manifest intention to prevent the economic waste and disincentives to investment associated with such retrospective standard setting?

We urge this Court to clarify the law on these important points. The Ninth Circuit's decision in *Stewmon* adopts an incorrect, unworkable, and potentially ruinous approach to Section 4.33.3 that is in direct conflict with the approach taken by other courts and should be overturned. More broadly, the Ninth Circuit's reflexive and conclusive deference to a post hoc reinterpretation of an agency regulation, set forth in an *amicus* brief, misreads fundamental administrative law precedents of this Court and subverts Congress' effort to establish a fair and workable regulatory regime for new construction standards under the ADA. If allowed to stand unchecked, the Ninth Circuit decision opens the door to abuse of regulatory authority at the expense not only of movie theater businesses and others who have constructed new facilities in reliance upon the ADA's ostensible protections against retroactive standard setting, but also of regulated entities in other industries that make long-term decisions in reliance upon legislative protections against post hoc changes in regulatory standards.

I. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 4.33.3 LIES ON ONE SIDE OF A SPLIT AMONG THE CIRCUITS THAT THIS COURT SHOULD RESOLVE

Judicial interpretation and application of Section 4.33.3 is a picture of inconsistency and uncertainty. The Fifth Circuit has interpreted the regulation's line-of-sight

comparability standard to require an unobstructed line of sight from seat to screen from a location "amidst general public seating." That court, moreover, specifically rejected the "viewing angle" gloss that DOJ sought to place on the language of the regulation. *See Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788-89 (5th Cir. 2000). A federal district court in New York reached a similar conclusion. *See Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002) (finding that Section 4.33.3 imposes a "viewing angle" requirement, but adopting a modified version of the *Lara* court's ruling that unobstructed views from positions within seating for the general public satisfy Section 4.33.3), *vacated and remanded*, 69 Fed. Appx. 19 2003 WL 21510423 (2d Cir. 2003) (directing district court to consider whether DOJ interpretation should be given deference and whether defendant had preconstruction notice).

The Sixth Circuit, however, in a decision handed down since Regal Cinemas filed its Petition for Certiorari, has opined that the requirement of Section 4.33.3 cannot be limited (as the Fifth Circuit has held) to providing an "unobstructed view." *United States v. Cinemark USA, Inc.*, No. 02-3100, 2003 WL 22508500 at **6-9 (6th Cir. Nov. 6, 2003). Yet the Sixth Circuit provided no substitute definition, instead remanding to the district court for an initial decision. Meanwhile, a district court in Massachusetts has accepted DOJ's claim that Section 4.33.3 imposes a "viewing angle" requirement, but has also concluded that DOJ, having provided no pre-construction notice to the theater builder, cannot impose that requirement retroactively without violating due process. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003). The First Circuit now has this case on appeal.

The Ninth Circuit's decision in *Stewmon* sits at the outer edge of this mass of confusion. The opinion of the

panel majority decrees that wheelchair seating must be placed so that it has a viewing angle "within the range of angles offered to the general public in the stadium-style seats." 339 F.3d at 1133. As Judge Kleinfeld's dissent rightly points out, this requirement, aside from having no grounding in the regulation's language, has no clear meaning and, thus, leaves theater owners in legal limbo. Ironically, petitioner Regal Cinemas, like the *amici*, places wheelchair seats inside the floor plan for general seating. The wheelchair seats therefore already provide a viewing angle within the range offered "members of the general public." Yet the Ninth Circuit panel majority found this to be inadequate, and entered summary judgment for the plaintiffs on a theory that the regulatory requirement of comparable lines of sight mandates some sort of comparative test – the terms of which the majority fails to specify – between viewing angles from wheelchair seats and viewing angles from a subset of the non-wheelchair seats.

To the extent that the Ninth Circuit decision may be read as endorsing the government's position – that "lines of sight comparable" means a viewing angle "better than 50 percent of the seats" – that standard too finds no grounding in the regulation and is, in any event, completely subjective. After all, why should a "comparable" line of sight mean a viewing angle "better" than the angle from half the seats – and what does "better" mean anyway, where preference is subjective and can vary from person to person for a multitude of reasons?

In the debate between the Ninth Circuit majority and the Fifth Circuit joined by Judge Kleinfeld in his *Stewmon* dissent, it is evident which side offers the more logical and reasonable interpretation of Section 4.33.3. A regulation that allows wheelchair seating to be grouped in a single location, while requiring that the seating be "integral" to a seating plan and offer "lines of sight comparable" to those

available to the general public, is best read as mandating unobstructed views from a location within the general seating plan. In this way, theater builders are prohibited, as the ADA intended, from ghettoizing wheelchair patrons in special sections or in seats where the screen is obscured. But for present purposes, it is most urgent simply to note that the movie theater industry finds itself in a state of total uncertainty about the legality of much of its basic infrastructure and, in the Ninth Circuit, now operates under a rule that makes no sense and that portends financial consequences of unknown but potentially enormous proportions.

II. THE NINTH CIRCUIT'S DECISION REFLECTS A FUNDAMENTAL MISUNDERSTANDING, ALSO EVIDENT IN RECENT DECISIONS OF OTHER LOWER COURTS, OF THE SOURCES OF, AND LIMITS ON, JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF THEIR OWN REGULATIONS

The Ninth Circuit's decision in *Stewmon* rests on the mechanistic application of a peculiarly stunted conception of the doctrine of judicial deference to agency regulatory interpretations that this Court first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1941). *See* 339 F.3d at 1131 & n.6 (citing recent decisions applying *Seminole Rock* deference). This Court's precedents make plain that *Seminole Rock* deference operates only as a qualified presumption of congressional intent as to the scope of agency policymaking authority. In ignoring this fundamental limitation on the *Seminole Rock* doctrine and blindly deferring to DOJ's campaign to make regulatory changes through *amicus* briefs, the Ninth Circuit subverted

Congress' intent to circumscribe agency policymaking under Title III of the ADA.[6]

Seminole Rock deference to agency interpretations of regulations that Congress has authorized agencies to promulgate – like *Chevron*[7] deference to agency interpretations of statutes that Congress has authorized agencies to administer – is based on congressional intent. In the *Seminole Rock* context, courts apply a presumption of implied legislative intent: the authority to promulgate regulations, absent convincing evidence that Congress intended otherwise, is presumed to carry with it the authority to resolve ambiguities in those regulations. "Because applying an agency's regulations to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980) (respect traditionally shown to agency regulatory interpretations is "particularly apt" where regulations

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[6] The Ninth Circuit specifically rejected petitioners' objections to the manner in which DOJ sought to add new content to Section 4.33.3, citing *Auer v. Robbins*, 519 U.S. 452 (1997), as support for its conclusion that DOJ did not forfeit its claim to deference by announcing its new interpretation of Section 4.33.3 in an *amicus* brief, rather than through a more formal process designed to ensure adequate consideration of the views of potentially affected parties. *See Stewmon*, 339 F.3d at 1131 n.6. The reasons why *Auer* cannot sustain DOJ's retroactive imposition of new substantive obligations without notice-and-comment are set forth in the Petition for Certiorari filed by Regal Cinemas and Eastgate Theater. *Amici* concur in that analysis.

[7] *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

were promulgated under statute giving "broad administrative lawmaking power to the agency"); *compare Chevron*, 467 U.S. at 843-44 (where Congress has delegated "authority to the agency to elucidate a specific provision of [a] statute by regulation," whether explicitly or implicitly, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

As is evident in a number of this Court's recent administrative law precedents, however, the *Seminole Rock* presumption of an agency's authority to interpret its own regulations is only a qualified presumption. This Court has emphasized, for example, that *Seminole Rock* deference does not function as a license for arbitrary lawmaking. Even where applicable statutes impose no particular limitations on agency power to establish standards through informal interpretation, courts do not presume that Congress intended for courts to defer to agency interpretations that do not articulate a "reasoned and consistent view," or that contradict views "advocated in past cases." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("An agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view.") (internal quotation marks omitted). Deference has also been denied where an alternative to the agency's preferred "reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* at 512; *see also Auer*, 519 U.S. at 462 (contrasting "fair and considered judgment[s]," which are owed deference, with "post hoc rationalization[s]," which are not) (internal quotation marks omitted).

This Court has also ruled that *Seminole Rock*'s presumption of agency authority to interpret agency

regulations does not extend to "interpretations" that would upend an established statutory scheme. In *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994), this Court declined to defer to the "true doubt rule," under which the Department of Labor shifted the burden of persuasion to the party opposing certain benefits claims. The government argued that the true doubt rule, as applied to cases arising under the Black Lung Benefits Act, must be accepted as a permissible agency interpretation of a regulation providing that black lung "claimants be given the benefit of all reasonable doubt as to the existence of . . . disability or death due to pneumoconiosis." *Id.* at 271 (quoting 20 C.F.R. § 718.3(c) (1993)). The Court found that this true doubt rule conflicted with section 7(c) of the Administrative Procedure Act. Even assuming that the black lung statute empowered Labor "to displace section 7(c) through regulation," the Court found that Labor's "ambiguous regulation" was insufficient to "overcome the presumption that these adjudications under the BLBA are subject to § 7(c)'s burden of proof provision." *Id.* In short, the presumption that Congress invested the agency with the power to interpret its own regulation did not extend to an "interpretation" of an ambiguous regulation that would effectively exempt agency proceedings from a fundamental background rule of administrative adjudication.

The Ninth Circuit's decision in *Stewmon* fails to apprehend that *Seminole Rock* operates as a qualified, rather than absolute presumption of agency authority to engage in regulatory interpretation. In according *Seminole Rock* deference to DOJ's various interpretations of Section 4.33.3, the Ninth Circuit, like the other courts that have imposed ADA liability on stadium-style theater owners, elided a critical threshold inquiry: whether the statute under which the agency promulgates and administers the

regulatory requirements in question limits the agency's power to establish new substantive rules through informal interpretation. In particular, these courts have failed to recognize that Title III of the ADA cannot reasonably be construed to authorize DOJ "interpretations" of new construction regulations that impose new substantive obligations not communicated by the terms of the regulations or the statutorily mandated technical guidance.

In establishing the Title III requirements for privately operated public accommodations and commercial facilities, Congress drew a fundamental distinction between preexisting and newly constructed facilities. To avoid liability for discrimination against the disabled, owners of preexisting facilities were required to remove structural barriers only where "such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv); *see id.* § 12181(9) (whether an action is "readily achievable" depends upon factors including the "nature and cost of the action needed," and the effect of the action on the finances and operations of the targeted facility). New facilities, designed and constructed "for first occupancy later than 30 months after the date of enactment of this Act," are subject to more exacting requirements. Such facilities must conform to "standards set forth or incorporated by reference in regulations issued under this title," unless it is "structurally impractical" to meet these standards. *Id.* § 12183(a)(1); *see* 28 C.F.R. § 36.406(a).

In establishing this more exacting requirement for new construction, along with enforcement provisions allowing both private suits for injunctive relief and government actions for equitable relief and substantial civil penalties (*see id.* § 12188(a)-(b)), Congress was aware that retroactive application of new construction specifications would entail significant costs. Because it is far

more expensive to redesign and reconstruct facilities to meet these same standards in the first instance, retroactive specification of standards is both economically wasteful and unfair to the builders of new facilities. The standard setting process for newly constructed commercial facilities was designed to avoid such waste and unfairness.[8] Congress declined to authorize direct enforcement of

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[8] Congress' recognition of the importance of timely and authoritative standards for new construction is demonstrated by the history of Section 306(d) of the ADA, 42 U.S.C. § 12186(d), which specified default standards for new construction upon which builders of new facilities could rely in the event that DOJ failed to provide the authoritative regulatory guidance mandated by the Act. In testimony before the House Committee on the Judiciary, a representative of the American Institute of Architects argued that the creation of new construction standards could lead to "costly, often complicated redesign" if architects were forced to design buildings before they could "know with any certainty what they must do to comply" with the new construction standards. *See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 before the House Comm. on the Judiciary*, 101st Cong. 308 (testimony of Robert Lynch, American Institute of Architects). The architects urged Congress to eliminate costly redesigns by specifying interim, safe harbor standards for design work performed before promulgation of DOJ's standards. *See id.* at 314 (arguing that ADA should provide that compliance with existing requirements, established by national standards organization, would be "sufficient, though not necessary" to satisfy ADA requirements for new construction during transition period). The House Judiciary Committee reported a bill that provided the requested safe harbor through incorporation of existing bodies of specific accessibility standards. *See* H. Rep. No. 101-485(III) at 15, 18 (explaining that "particularized guidance and specifications regarding the meaning of the phrase 'readily accessible to and usable by [disabled persons]' " was immediately available from certain public and private standard-setting bodies, and that under the ADA, when fully implemented, "such specificity will be provided by the expanded Minimum Guidelines and Requirements for Accessible Design (MGRAD) standards to be issued by the Architectural and Transportation Barriers Compliance Board and by the regulations issued by the Attorney General").

a general statutory standard for accessibility of new construction, providing instead for the enforcement of regulatory standards devised to ensure accessibility. *See id.* §§ 12186(b)-(d), 12204. Statutory deadlines for the promulgation of regulations and the publication of technical assistance manuals were set to ensure that this guidance would be available in advance of the effective date of the new construction requirements. *See id.* §§ 12186(b)-(c), 12204(a).[9] In short, the structure of Title III and many of its critical terms demonstrate Congress' strong determination to ensure that parties contemplating construction of new facilities would have access to authoritative descriptions of their obligations before they constructed any facilities governed by the new construction standards.

The implications of Title III's emphasis on clear demarcation of new construction standards were recognized by the Court of Appeals for the District of Columbia Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (Silberman, J.). Plaintiffs in that case asserted that courts owed *Seminole Rock* deference to a DOJ interpretation of certain Technical Assistance Manual provisions, set forth in a DOJ *amicus* brief in a private enforcement action, pertaining to views from wheelchair seating areas in sports arenas over standing spectators. The D.C. Circuit noted that DOJ's

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[9] Section 506 of the ADA requires DOJ to develop and implement a plan to provide technical assistance to entities covered by the ADA, 42 U.S.C. §§ 12206(a), (c)(2)(C), and that to provide "appropriate technical assistance manuals to individuals and entities with rights or duties" under subchapter III, *id.* § 12206(c)(3). Covered entities cannot rely on the government's failure to supply technical guidance as a defense to ADA liability. *Id.* § 506(e). However, there is no suggestion that Congress intended to allow technical guidance to be used to impose new requirements on a retrospective basis.

effort to add new content to the provisions of the manual after the fact ran counter to Title III's emphasis on the establishment of authoritative prospective guidance, and expressed doubt that *Seminole Rock* deference could excuse this contradiction:

> Although there are circumstances in which a federal court may accept an agency's interpretation of a statute or regulation set forth only in an *amicus* brief, it is not clear here that the Department, which has the authority and duty to issue technical assistance manuals interpreting and applying its regulation, can further add to its interpretation in litigation – and get deference to that marginally additional interpretation.

Id. at 589 (internal citations omitted).[10]

Although *Paralyzed Veterans* ultimately relied on other reasons to reject DOJ's attempt to add to the requirements imposed by the regulations and technical assistance manual through "interpretation," its doubts concerning the availability of *Seminole Rock* deference

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[10] *Paralyzed Veterans* also addressed a challenge to DOJ's view, set forth in the Technical Assistance Manual, that the regulatory requirement of line of sight comparability refers not only to permanent obstructions but also to obstructions "caused temporarily by standing spectators." 117 F.3d at 583. The D.C. Circuit determined that the manual embodied a permissible interpretation of the regulation and, although the "issue [was] not easy," that DOJ had not changed its interpretation of Section 4.33.3 so as to forfeit *Seminole Rock* deference. *Id.* at 587. The Third Circuit has expressly rejected the D.C. Circuit's approach on this point. *See Caruso v. Blockbuster-Sony Music Entertainment Centre at Waterfront*, 193 F.3d 730, 736-37 (3rd Cir. 1999) (manual provisions respecting views over standing spectators did embody a change in DOJ's interpretation of section 4.33.3, which precluded DOJ from claiming *Seminole Rock* deference) (expressly disagreeing with *Paralyzed Veterans*).

were well founded. Where Congress goes to great lengths to provide clear guidance to regulated entities in order to reduce the risks of legal change through post hoc interpretation or clarification, as it did in the new construction provisions of the ADA, the ordinary presumption concerning the allocation of policy making authority that underlies *Seminole Rock* deference has no application. To assess the reasonableness of an agency's interpretation of its own regulation under these circumstances, a court must advance beyond a text-bound examination of ambiguity and ranges of permissible interpretations to consider whether the agency's post hoc "clarification" of its regulatory standards violates Congress' intent to protect against retroactive impositions of liability.[11]

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[11] Some courts of appeals have held that courts owe less deference to an agency's interpretation of its own regulation where that interpretation expands liability for past conduct than when the interpretation has exclusively prospective effects. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25 (1st Cir. 2000) (although OSHA interpretation was reasonable and valid, it could not be applied in a penalty case because regulation itself provided inadequate notice of the newly elaborated standard); *Trinity Broadcasting v. FCC,* 211 F.3d 618 (D.C. Cir. 2000) (plausible interpretation of FCC rule cannot serve as the basis for non-renewal of broadcast license where basis for this penalty was not "ascertainably certain" at the time of the alleged violation); *see generally* Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.11 (2003 & Supp. 2004) (arguing that "due process considerations" provide support for a two-tier approach to *Seminole Rock* under which agencies receive greater deference for interpretations that narrow eligibility for a benefit and for determinations that expand liability for penalties). In the context of this case, the fairness and due process concerns that arise when an agency interprets its regulations in a manner that leads to the imposition of penalties for past violations of a newly announced specification merely reinforce limitations on *Seminole Rock* deference that are compelled by Congress' clear intention that Title III of the ADA not produce such results.

The *Stewmon* majority, along with other decisions that have found ADA violations in stadium-style theaters based on DOJ's various interpretations of Section 4.33.3, improperly relied upon a narrow, text-bound analysis of *Seminole Rock* deference. Reviewing the text of Section 4.33.3 and DOJ's interpretative reformulation of that standard in isolation, the *Stewmon* majority asked only whether it was "unreasonable for DOJ to interpret 'comparable line of sight' to encompass factors in addition to physical obstructions, such as viewing angle." *Stewmon*, 339 F.3d at 1131. Upon finding that DOJ's interpretation of Section 4.33.3, as set forth in its *amicus* brief in the *Stewmon* appeal, "'sensibly conform[ed] to the purpose and wording of the regulations,'" the panel majority concluded that *Seminole Rock* deference was appropriate. *Stewmon*, 339 F.3d at 1131 (quoting *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-51 (1991)). Entirely missing from the panel majority's analysis was any consideration of Congress' unmistakable intention to establish a regulatory regime for new construction standards that would provide clear standards up front – a regime intended to avoid precisely the sort of economically wasteful post-construction trap that DOJ has sprung on entities that built stadium-style theaters in conformity with the regulations in place before DOJ set out the first variant of its post-1997 position in the *Lara amicus* brief.

The recent decisions of the Second and Sixth Circuits reflect similarly deficient conceptions of *Seminole Rock* deference. In *Meineker,* 69 Fed. Appx. 19, the Second Circuit did not actually decide whether *Seminole Rock* deference was available. Noting that the deference issue had been raised initially on appeal "when DOJ entered the case as an *amicus* for the first time," it vacated the trial court's summary judgment for the theater complex and

remanded for consideration of that issue.[12] However, in instructing the district court as to its task on remand, the Second Circuit framed the deference issue in virtually the same narrow terms as the panel majority in *Stewmon*, directing the court to consider whether "DOJ's interpretation of § 4.33.3 represents a 'fair and considered judgment' consistent with the history of the regulation" (*id.* at 25 (quoting *Auer*, 519 U.S. at 462)), as opposed to "a *post hoc* rationalization or 'convenient litigating position' entitled to little deference." *Id.* (quoting *Bowen*, 488 U.S. at 213). Similarly, in *United States v. Cinemark,* the Sixth Circuit concluded that DOJ's interpretation of Section 4.33.3 was entitled to deference based on a brief, wholly textual analysis, giving no consideration to the effect of such retroactive standard-setting on the system for establishing new construction standards that Congress sought to establish in Title III. *See* 2003 WL 22508500 at *7 ("DOJ's interpretation should be upheld unless it is 'plainly erroneous or

[12] The Second Circuit also instructed the district court to consider the extent of the defendant's pre-construction notice of the DOJ interpretation, presumably for purposes of determining the appropriate scope of any equitable relief. *See* 60 Fed. Appx. at 25-26; *see also United States v. Cinemark USA, Inc.,* 2003 WL 22508500 at *9 (theater builder's reasonable reliance on permit from DOJ approved permitting authority places due process limits on the extent of permissible injunctive relief). Although equitable limits on injunctive relief may alleviate the unfairness of a misguided deference to DOJ's interpretations of Section 4.33.3 in some circuits, the availability of this avenue of relief in the Ninth Circuit is open to question. *See Long v. Coast Resorts, Inc.,* 267 F.3d 918, 922 (9th Cir. 2001) (reversing magistrate ruling that equities did not favor injunction requiring expensive renovations to new construction to widen certain doorways from 28 to 32 inches in view of builder's substantial compliance and minimal inconvenience to wheelchair users).

inconsistent with regulation.'" (quoting *Auer*, 519 U.S. at 461)).[13]

The implausibility of the *Stewmon* majority's deference to DOJ's "interpretation" of Section 4.33.3 to impose new liability for pre-interpretation conduct is underscored by DOJ's lack of authority to accomplish the same result through formal rulemaking. In November 1999, the Access Board published proposed accessibility guidelines for public comment. *See* 64 Fed. Reg. 62,248. The proposed rule – which on the question of line-of-sight comparability states only that the Board is considering the adoption of specific requirements consistent with DOJ's interpretations of Section 4.33.3 (*id.* at 62,278) – stakes no claim that the Board and DOJ are empowered to establish new construction standards applicable to facilities designed for occupancy and use before the promulgation of those regulations in final form. Nor could such a claim be sustained, given the strong presumption against retroactive rulemaking authority and the lack of any such authority in the new construction provisions of the ADA. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) ("Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."). The Ninth Circuit in *Stewmon* nevertheless found that a new standard embodying the DOJ interpretation could be applied retroactively in this case, through "interpretation" of a prior regulation.

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[13] A district court in Massachusetts has applied *Seminole Rock* to DOJ's post-1997 "interpretations" of Section 4.33.3 in similar text-bound fashion. *See Hoyts Cinemas*, 256 F. Supp. 2d at 89-90 (DOJ's interpretation of Section 4.33.3 was not "'plainly erroneous or inconsistent with' the regulation," or contradicted by "'other indications of [DOJ's] intent ... at the time of the regulation's promulgation'" (quoting *Auer*, 519 U.S. at 461, and *Thomas Jefferson Univ.*, 512 U.S. at 512), *appeals pending*, Nos. 03-1787, 03-1808 (1st Cir.).

In sum, the Ninth Circuit in *Stewmon*, like the other courts that have deferred to the interpretations of Section 4.33.3 that DOJ began asserting in its *amicus* brief in *Lara v. Cinemark USA*, has improperly applied a narrow, text-bound understanding of *Seminole Rock* deference. This approach wholly ignores the critical threshold question presented not only in the stadium-theater cases, but also in other settings where Congress goes to unusual lengths to provide regulated entities with authoritative, reliable guidance upon which to base major economic decisions: whether an agency's presumed power to make policy through the interpretation of its own regulatory standards encompasses the power to upset settled expectations that Congress has specifically sought to protect. This Court should grant the petition for certiorari to correct this misguided approach.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

REGAL CINEMAS, INC. AND EASTGATE THEATRE, INC.,
PETITIONERS

v.

KATHY STEWMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Pursuant to Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 *et seq.*, a Department of Justice regulation requires that wheelchair spaces in newly constructed assembly areas "provide people with physical disabilities * * * lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. The questions presented are:

1. Whether, in stadium-style movie theaters with 300 or fewer seats, wheelchair seating that is limited to the very front rows of the theater and that is not part of the stadium-style seating complies with the regulation's requirement that "lines of sight" for individuals with disabilities be "comparable" to those enjoyed by the general public.

2. Whether a court should defer to an administrative agency's interpretation of its own regulation, when the interpretation is adopted without notice and comment under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

3. Whether an administrative agency's interpretation of a regulation may be enforced retroactively, even though the interpretation was adopted without notice and comment under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

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In the Supreme Court of the United States

No. 03-641

REGAL CINEMAS, INC. AND EASTGATE THEATRE, INC., PETITIONERS

v.

KATHY STEWMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The central question in this case is whether the Department of Justice has reasonably interpreted its own regulation, which requires that wheelchair users in movie theaters be afforded "lines of sight" that are "comparable" to those enjoyed by the general public, to prohibit movie theaters from relegating all wheelchair users to the worst seats in the very front of the theater and excluding them entirely from the benefits of modern stadium-style theater designs. That issue does not warrant further review both because forthcoming regulatory amendments are expected to address and resolve the interpretive question that petitioners raise and because the Justice Department's application of its regulation fully comports with longstanding administrative principles. Beyond that, petitioners' attempt to obtain, on interlocutory appeal of a liability ruling, this Court's review of purely hypothesized equitable relief that has not been, and may never be, ordered by the lower court

or any other court does not satisfy this Court's established criteria for granting certiorari.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), including in "such critical areas as * * * public accommodations * * * [and] recreation." 42 U.S.C. 12101(a)(3).[1] Title III of the Disabilities Act mandates that:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). The "public accommodation[s]" covered by Title III include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment," and an "auditorium, convention center, lecture hall, or other place of public gathering." 42 U.S.C. 12181(7)(C) and (D). Congress defined the prohibited forms of discrimination to include "a failure to design and construct facilities for first occupancy [after January 26, 1993], that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1).

To implement those new construction requirements, Congress directed the Attorney General to promulgate regula-

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[1] A study submitted to Congress by the National Council on the Handicapped (currently known as the National Council on Disability) revealed that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances. *On the Threshold of Independence* 16 (1988).

tions that are consistent with minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board (Access Board). See 42 U.S.C. 12186(b) and (c), 12204. The Department of Justice accordingly issued final regulations establishing accessibility requirements for new construction that incorporated the Access Board's Americans with Disabilities Act Accessibility Guidelines (Accessibility Guidelines). See 28 C.F.R. 36.406(a), Pt. 36, App. A; 56 Fed. Reg. 35,544, 35,546 (1991). One of the Department's regulations is Standard 4.33.3, which requires that, in movie theaters and other public assembly areas:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

28 C.F.R. Pt. 36, App. A, § 4.33.3 (Standard 4.33.3).

The Access Board is close to completing a multi-year revision of its Accessibility Guidelines. See Access Board, *Revision of ADA and ABA Accessibility Guidelines*, <http://www.access-board.gov/ada-aba/status.htm.> The Board published a notice of proposed rulemaking in 1999, 64 Fed. Reg. 62,248-62,538 (1999), and made public its "draft final guidelines" in April 2002. See 67 Fed. Reg. 15,509 (2002). Those amended guidelines make clear that, in assembly areas of more than 300 seats, wheelchair spaces shall be dispersed and shall provide wheelchair users a choice "of seating locations and viewing angles substantially equivalent to, or better than," those "available to all other spectators." Access Board, *Draft Final ADA and ABA Accessibility Guidelines* § 221.2.3 (April 2002). The draft final guidelines also state that vertical dispersal of wheelchair spaces would not be required in assembly areas of 300 seats or less if the wheelchair seats provided "viewing angles that are equiva-

lent to, or better than, the average viewing angle provided in the facility." *Id.* § 221.2.3.2 (emphasis omitted).

The Access Board unanimously approved its revised guidelines in their final form on January 14, 2004, <http://www.access-board.gov/ada-aba/status.htm>, and submitted them to the Office of Management and Budget for review and clearance pursuant to Executive Order No. 12,866, 58 Fed. Reg. 51,735 (1993). OMB has not yet completed that process. See Office of Info. & Regulatory Affairs Exec. Order Submissions Under Review (May 28, 2004), <http://www.whitehouse.gov/omb/ library/ OMBREGSP.html>.

2. a. The mid-1990s saw a revolution in movie theater design with the advent of "stadium-style" seating. Traditional movie theaters were designed with rows of seats on gently sloping floors. In 1995, the first "stadium-style" movie theater opened in the United States. As the name suggests, the seating plan for such theaters mimics that of a stadium, where the seats are placed on elevated tiers, with each row of seats rising up to 18 inches above the row in front of it. Pet. App. 3a-4a; Pet. 2. Some stadium-style theaters retained a small, traditional-style area with seats on a flat or sloped floor that are close to the movie screen and that are situated in front of and significantly lower than the stadium section. See Pet. App. 4a. The stadium-style theaters proved to be very popular among customers, causing a "boom in stadium-style theater construction" across the country. AMC Br. 3; see Pet. 2.

Some of the new theaters were designed in a manner that included wheelchair-accessible seating in the stadium-seating area. Pet. App. 4a n.3. In other theaters, however, the stadium-style section can be accessed only by stairs, and wheelchair users are restricted to the traditional section immediately in front of the movie screen. See *id.* at 4a, 28a. Seats that close to the movie screen have extreme viewing angles that often cause significant physical discomfort and

high levels of image distortion. See *id.* at 4a-6a, 14a-15a & n.7, 17a. Patrons in those seats may have to tilt their heads back at an uncomfortable angle to see the whole picture and may experience blurry vision, dizziness, and nausea because of the difficulty of focusing their eyes on the film. See *id.* at 5a-6a, 17a. For that reason, the National Association of Theatre Owners previously acknowledged that seats in the very front rows are the "least desirable" and "the last to be taken." See *United States* v. *AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1101 (C.D. Cal. 2002).

b. Respondents are wheelchair users who have attempted to view movies in six of petitioners' stadium-style movie theater complexes. In the vast majority of petitioners' theaters at issue in this case, wheelchair users are required to sit in the non-stadium-style area very close to the screen. In 16 of the theaters, all wheelchair spaces are in the front row. Some of those seats are only 11 feet from the screen. Pet. App. 3a-4a & n.3; C.A. E.R. 40-41, 43-58.

Respondents filed suit under Title III of the Disabilities Act, alleging that the theaters violated the requirement in Standard 4.33.3 that lines of sight be comparable by creating "significant disadvantages for wheelchair-bound patrons." Pet. App. 4a. In particular, while general public seating provided an average vertical viewing angle to the screen of 20 degrees, the viewing angles in the wheelchair locations right in front of the screen ranged from 24 to 60 degrees and averaged 42 degrees. *Ibid.* That "tremendous disparity" in lines of sight was exacerbated by the general inability of customers in wheelchairs to slump or recline their bodies to compensate for the unfavorable viewing angles. *Id.* at 5a; see *id.* at 15a n.7 ("uncontroverted evidence" that the viewing angles are "objectively uncomfortable"). Respondents endured significant physical difficulties and discomfort in trying to watch movies in petitioners' theaters. *Id.* at 5a-6a ("[I]t made me dizzy trying to focus. * * * I only lasted

about 15 minutes."); *id.* at 6a (view made patron "nauseous and gave her a headache").

The district court granted summary judgment to petitioners. Pet. App. 27a-39a. "[T]empting as it [was] to rely on the 'plain meaning' of the regulation" (*id.* at 35a), the district court chose instead (*id.* at 32a-36a) to track the Fifth Circuit's decision in *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783, cert. denied, 531 U.S. 944 (2000), which held that the regulatory requirement that patrons in wheelchairs be offered "comparable" "lines of sight" does not require "anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen," *id.* at 789.

3. The court of appeals reversed and entered summary judgment on liability for the respondents. Pet. App. 1a-26a. The court held that the Department of Justice reasonably construed its "comparable" "lines of sight" requirement in Standard 4.33.3 to encompass a patron's viewing angle to the screen. The court relied on the "plain meaning of the regulation both in general and as understood in the movie theater industry." *Id.* at 15a. The court also concluded that the Department's interpretation was consistent with the purpose of Title III:

> In the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose. We find it simply inconceivable that this arrangement could constitute "full and equal enjoyment" of movie theater services by disabled patrons.

Id. at 17a.

Judge Kleinfeld dissented. Pet. App. 18a-26a. He agreed that the majority "is rightly troubled by the notion of a wheelchair ghetto in one part of the movie theater with sight lines worse than those of the other patrons," but believed that problem could be addressed through the requirement that wheelchair seating be an "integral part" of the seating plan, where the "lines of sight cannot be substantially different from those of seats available for the general public." *Id.* at 21a. Judge Kleinfeld further criticized the majority for failing to provide a detailed "floorplan" for theater owners. *Id.* at 26a.

DISCUSSION

1. A Department of Justice regulation implementing Title III of the Americans with Disabilities Act requires that patrons in all assembly areas be afforded "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. The "core area of disagreement" for which petitioners seek this Court's review (Pet. Reply 3; see *id.* at 4) is whether that regulation requires that individuals with disabilities be afforded a comparable ability to view the screen or whether it merely requires that the view for disabled patrons not be obstructed. The Fifth Circuit has held that the regulation requires only that wheelchair patrons be afforded "unobstructed views of the screen." *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783, 789, cert. denied, 531 U.S. 944 (2000). By contrast, the court of appeals here, Pet. App. 12a-17a, and the Sixth Circuit, in *United States* v. *Cinemark USA, Inc.*, 348 F.3d 569, 576 n.6 (2003), petition for cert. pending, No. 03-1131 (filed Feb. 4, 2004), have held that the regulation also requires comparable viewing angles to the screen for individuals with disabilities. That conflict does not merit this Court's review for three reasons.

First, that "core area of disagreement" over interpretation of the Department's regulation is of no enduring importance because the dispute will be addressed and likely resolved by the Access Board's forthcoming promulgation of its updated Accessibility Guidelines, which will be followed by the Department of Justice's conforming amendments to its own regulations. See Access Board, *Draft Final ADA and ABA Accessibility Guidelines* §§ 221.2.3, 221.2.3.2 (Apr. 2, 2002). Furthermore, given the substantial weight that the Fifth Circuit put on what it perceived to be the Access Board's ambivalence about the coverage of viewing angles, 207 F.3d at 789, issuance of the updated guidance will largely remove the analytical underpinnings of that decision and thus may well effectively eliminate the circuit conflict.

There is no need for this Court to exercise its certiorari jurisdiction to address an issue of regulatory interpretation that is presently being addressed directly by the relevant regulatory bodies themselves. Further, the issuance of the Access Board's guidance, to be followed by the Department of Justice's amendment of the regulation at the center of the present litigation (Standard 4.33.3), will fundamentally change the terms of the debate on the question presented. The implications of those amendments should be addressed by the lower courts in the first instance.[2]

Second, the conflict is relatively shallow. Only the *Lara* court has rejected the Justice Department's interpretation of

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[2] Amicus National Association of Theatre Owners (NATO) emphasizes (Br. 2-3 & App. A) that, in the midst of its members' litigation over this issue, it requested that the Justice Department undertake rulemaking to clarify the coverage of viewing angles. That regulatory process is now underway. As explained in the Justice Department's response, moreover, the Department's obligation to ensure that its regulations comport with the Access Board's "minimum guidelines," 42 U.S.C. 12186(b) and (c), 12204, has caused the Department to postpone issuing its own amendments until the Access Board completes its revisions. See NATO Br. App. B.

its own regulation. The Sixth Circuit recently joined the court of appeals in this case in sustaining the Department's interpretation. The issue is being actively litigated within the First and Second Circuits. See *United States* v. *Hoyts Cinemas Corp.*, Nos. 03-1646, 03-1787 & 03-1808 (1st Cir. argued Feb. 6, 2004); *Meineker* v. *Hoyts Cinemas Corp.*, 69 Fed. Appx. 19 (2d Cir. 2003) (remanding case).[3] If those circuits join the rulings of the Sixth and Ninth Circuits, and if the Fifth Circuit is ever presented with another case raising the same issue, then that court might reconsider its position—a prospect that is heightened by the forthcoming regulatory amendment.

Nor is this an area in which uniformity is especially vital. Building codes, design requirements, and zoning restrictions vary in manifold ways not just from circuit to circuit, or even from state to state, but often from county to county and town to town. In addition, every State has its own law providing (at varying levels) protection for the rights of individuals with disabilities. See *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001). Theater owners and their construction companies and architects thus already confront and deal with variations in the laws and regulations governing theater design on a daily basis.[4] Petitioners have identified no reason why they cannot similarly accommodate this shallow conflict on the scope of Standard 4.33.3 for the time remaining until the clarifying amendments issue. To the extent that petitioners seek a uniform

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[3] Petitioner's parent company now owns Hoyts Cinemas, *Meineker*, 69 Fed. Appx. at 21 n.1, and paid for the preparation of both the petition and Hoyts' amicus brief in this case, Hoyts Br. 1 n.1.

[4] Petitioners' own amicus makes this point quite forcefully. NATO Br. 11 ("The design and construction of a modern motion picture theatre * * * requir[es] the accommodation of a myriad of economic, aesthetic and legal constraints. Architects and other design professionals are required to consider and ensure compliance with all federal, state and local building codes, safety regulations and accessibility requirements.").

model for new construction, nothing in the Fifth Circuit's decision prevents them from complying with the requirements of the Disabilities Act as enforced by the Sixth and Ninth Circuits.

Third, and relatedly, the court of appeals' decision in the present case is correct—and the *Lara* court's analysis is such a stark departure from well-established principles of regulatory interpretation that the circuit split is unlikely to widen. The Justice Department's interpretation of "comparable" "lines of sight" as encompassing patrons' viewing angles must be sustained unless it is "plainly erroneous or inconsistent with the regulation." See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Department's interpretation comports with the ordinary understanding of "lines of sight." See *Webster's Ninth New Collegiate Dictionary* 695 (1991) ("line[] of sight" is "a line from an observer's eye to a distant point toward which he is looking"). It also tracks long-established understandings of the phrase within the theater industry.[5] Indeed, petitioners'

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[5] See Society of Motion Picture & Television Engineers (SMPTE), *EG 18-1989, Engineering Guideline: Design of Effective Cine Theaters*, at 3 (Dec. 19, 1989), *reprinted* 99 Soc'y Motion Picture & Television Engr's J. 494 (June 1990) ("Since the normal line of sight is 12° to 15° below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35°, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15°."); *id.* at 495 ("The nearest viewer's vertical line of sight should not exceed 35° from the horizontal to the top of the projected image."); SMPTE, *EG 18-1994, Engineering Guideline: Design of Effetive Cine Theaters* (Mar. 25, 1994) (same); American Institute of Architects, *Ramsey/Sleeper Architectural Graphic Standards* 17 (student ed. 1989) (discussing the "sightline from the first row to the top of the screen" in terms of maximum recommended angle); George C. Izenour, *Theater Design* 4 (1977) ("A good sight line is one in which there are no impediments to vision and angular displacement (vertical and horizontal) of the eyes and head falls within the criteria for

own amicus, the National Association of Theatre Owners (NATO), took the position immediately prior to the first construction of stadium-style theaters in this country, that "lines of sight are measured in degrees," not just in terms of whether a view is obstructed. See NATO, *Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums* 6 (Jan. 27, 1994); see *United States* v. *AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1101-1102 (C.D. Cal. 2002) (discussing repeated statements of NATO, prior to a change in position by 2000, acknowledging that "lines of sight are most commonly measured in degrees"). Hoyts Cinemas, which is owned by the same parent company as petitioner, see note 3, *supra*, was aware in 1991 that sight lines included viewing angles. *Meineker*, 69 Fed. Appx. at 25 nn.7 & 9. The Justice Department's interpretation thus rests upon plain meaning, backed by an established industry understanding that the phrase "lines of sight" encompasses far more than a binary inquiry into whether the viewer's vision is obstructed.

Petitioners' (Pet. 8, 17) and the dissenting judge's (Pet. App. 20a) suggestion that the Access Board interpreted "lines of sight" to exclude viewing angles is flatly incorrect. In 1998, the Access Board published a technical assistance manual that explained, in a section titled "Sight Lines," that

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comfort."); *id.* at 3 (diagram showing "Normal Sight Line" as 15 degrees below horizontal); *id.* at 284 ("distance and angular displacement" are among the types of "sight line problems" found in auditoriums); *id.* at 71, 598-599 (excerpting a treatise from the 1830s, John Scott Russell, *Treatise on Sight Lines and Seating* (1830), which provided that the "best" seats in an auditorium "are not so far forward as, by being immediately under the speaker, to require [one] to look up at a painful angle of elevation"); Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* 69 (2d ed. 1964) ("Maximum tolerable upward sight line angle for motion pictures" was 30 degrees from the horizontal to the top of the movie screen.); *ibid.* (viewing experience will be adversely affected by "upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action").

"[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas." Access Board, *Americans with Disabilities Act Accessibility Guidelines Manual* 117 (1998). Likewise, in November 1999, the Board explained that,

> [a]s stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen.

64 Fed. Reg. 62,248, 62,278 (1999). The Access Board's simultaneous statement in 1999 that it was considering whether to include "specific requirements," *ibid.*, on viewing angles in its final rules was simply an acknowledgment that the Accessibility Guidelines did not yet "include specific technical provisions to assist design professionals." *Id.* at 62,277. But the fact that the Access Board's own technical publication lacked design specifications does not mean that the Justice Department's regulation lacked the substantive coverage of viewing angles.

That ordinary understanding of the phrase "lines of sight" also serves the central purpose of Title III of the Disabilities Act, which is to preclude the "outright intentional exclusion" of individuals with disabilities and to ensure their "full and equal enjoyment of the goods, services, facilities, privileges, [and] advantages" offered by public accommodations. 42 U.S.C. 12101(a)(5), 12182(a). As petitioners themselves describe it (Pet. 2, 6), the advent of stadium-style seating in movie theaters marked a sea change in the viewing ex-

perience for theater patrons. The Department's interpretation of its regulation ensures that theater designs do not leave customers in wheelchairs on the sidelines and do not *completely exclude* them from experiencing and enjoying the benefits of that new innovation in movie-watching vantage points. Indeed, petitioners' position would have the perverse effect of causing the advent of stadium-style seating to enhance the viewing experience of patrons without disabilities while simultaneously immiserating patrons with disabilities.[6]

Moreover, petitioners' and the *Lara* court's reading of the regulation as prohibiting only obstructed views lacks any anchor in the regulatory text. The word "unobstructed" appears nowhere in Standard 4.33.3—a conspicuous omission if that were the regulation's sole *raison d'être*. Their cramped reading of the regulation also overlooks that Standard 4.33.3 applies not just to movie theaters, but to the entire swath of public assembly areas, including stadiums, live theaters, opera houses, and concert and lecture halls. It would confound congressional purpose to reduce the broad promise of "full and equal enjoyment" of "comparable" "lines of sight" in all those different venues to nothing more than a requirement that wheelchair users not be seated behind poles.

2. Petitioners also seek this Court's review (Pet. 18-26) of the court of appeals' holding that the Department's interpretation of its own regulation should be accorded deference. That claim does not merit further review. This Court has repeatedly held that an agency's interpretation of its own

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[6] Given the enormous "popularity with the theater-going public" of stadium-style seating (Pet. 2)—a consumer demand that prompted a nationwide reconfiguration of theaters (Pet. 2, 6)—petitioners' litigation position that the few remaining non-stadium style seats located in the very front rows of the theater are of "equal desirability" (Pet. 9 n.8) defies commonsense and common experience. See 64 Fed. Reg. at 62,278 (Access Board notes the "superior[ity]" and "popular[ity]" of stadium-style seating).

regulation is entitled to substantial deference. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 387-388 (2003) ("[T]he Commissioner's interpretation of her own regulations is eminently sensible and should have been given deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).").[7] Certiorari review is not warranted to say again what the Court said unanimously just last year.

Petitioners contend (Pet. 19-20; Pet. Reply 7-8) that the court of appeals' decision conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000). It does not. *Christensen* concerned the level of deference due to agency interpretations of *statutes*, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Christensen*, 529 U.S. at 587. With respect to the separate question of deference to an agency's interpretation of its own regulation, *Christensen* simply applied *Auer* and concluded that the particular agency interpretation before the Court did not merit deference because it was inconsistent with the regulation's text. *Id.* at 588. The Court has expressly reaffirmed the rule of deference to agency interpretations since *Christensen*. See *Keffeler*, *supra*; *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002).

Petitioners further argue (Pet. 20-23) that the courts of appeals have issued conflicting decisions on the deference due to agency interpretations of their own regulations. But petitioner has identified no conflict in the legal standard employed by the courts, nor is the government aware of any.

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[7] See also *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); *Auer*, 519 U.S. at 461 (agency interpretation will be sustained unless it is "plainly erroneous or inconsistent with the regulation") (citation omitted); *Thomas Jefferson Univ.*, 512 U.S. at 512 (same); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Bowles*, 325 U.S. at 414 (same).

The decisions petitioners cite are either irrelevant or simply reflect the fact that application of the same legal standard to different facts in different cases can yield different outcomes. That is to be expected. Rather than evidencing a need for this Court's intervention, those cases demonstrate that the deference standard already adopted by the Court is working.[8]

Petitioners also suggest (Pet. 22) a circuit conflict on the appropriateness of the Department's articulation of its views in an amicus brief. But, again, petitioners identify no conflict in the circuits on the legal standard to be applied in determining whether deference is appropriate. Both *National Wildlife Federation* v. *Browner*, 127 F.3d 1126 (D.C. Cir. 1997), and *Akzo Nobel Salt, Inc.* v. *Federal Mine Safety & Health Review Commission*, 212 F.3d 1301 (D.C. Cir. 2000), involved straightforward applications of *Auer*. The difference in outcomes turned not upon the law applied, but on whether, on the facts of the particular case, the interpretation reflected the "fair and considered judgment" of the agency. *National Wildlife*, 127 F.3d at 1129; *Akzo*, 212 F.3d at 1304. That inquiry is not in doubt here, because the Department's interpretation has also been manifested in

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[8] See *Meineker*, 69 Fed. Appx. at 23 (applying *Auer* and *Thomas Jefferson*); *Sketoe* v. *Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999) (agency interpretation of a *statute*), cert. denied, 529 U.S. 1057 (2000); *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (same), cert. denied, 528 U.S. 1106 (2000). While the District of Columbia and Third Circuits reached different conclusions about deference to the Justice Department's interpretation of its regulation in another context (views over standing spectators), both courts applied the same legal standard. See *Caruso* v. *Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 736-737 (3d Cir. 1999) (applying *Thomas Jefferson*); *Paralyzed Veterans* v. *D.C. Arena L.P.*, 117 F.3d 579, 584-585 (D.C. Cir. 1997) (applying *Auer* and *Thomas Jefferson*), cert. denied, 523 U.S. 1003 (1998). The Third Circuit just found that an "alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso*, 193 F.3d at 736 (quoting *Thomas Jefferson*, 512 U.S. at 512).

numerous enforcement actions. See *United States* v. *Cinemark USA, Inc.*, *supra*; *United States* v. *Hoyts Cinemas*, *supra*; *AMC Entm't*, *supra*; *Lonberg & United States* v. *Sanborn Theaters, Inc.*, No. 97-6598 (C.D. Cal.).[9]

In any event, this case is not an appropriate vehicle for addressing the level of deference due to an agency interpretation of its own regulations. First, in holding that "comparable" "lines of sight" encompasses the viewing angles to the screen, the court of appeals here (Pet. App. 15a) and the Sixth Circuit (03-1311 Pet. App. at 9a) both relied on the "plain meaning" of the regulatory text, which makes this case a particularly inapt vehicle for fixing the precise level of deference owed to an agency's interpretation of its own regulation. Cf. *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 & n.8 (2002) (declining to address the precise level of deference owed to an agency interpretation of a statute that reflected the best view of the statute's plain meaning).[10]

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[9] The other cases petitioners cite miss the mark. Dicta in *Keys* v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003) are of no help because the government's brief "did not offer an interpretation of the agency's regulations," *id.* at 994. *Brandt* v. *Village of Chebanse*, 82 F.3d 172 (7th Cir. 1996), and *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000), do not involve deference at all, but instead address whether a particular agency position reflects a legislative rather than an interpretive rule. Because, as the court of appeals here found (Pet. App. 15a), the "plain meaning" of the regulation "both in general and as understood in the movie theater industry" encompasses the viewers' relative ability to view the movie on the screen, the Department's interpretation falls squarely within the four corners of the regulatory text. Petitioners, for their part, make no effort to explain how the Department's position is any less interpretive (or more legislative) than their reading of the regulation as prohibiting only particular types of physical barriers to view. The forthcoming regulatory amendments render that debate of no enduring importance anyhow.

[10] Petitioners' contention (Pet. Reply 6) that there is a conflict on the agency deference rule between the Fifth Circuit in *Lara* and the court of appeals here is wrong. The Fifth Circuit never discussed the issue, see 207 F.3d at 787-789, as the district court in this case recognized, Pet. App. 32a-33a.

Second, petitioners do not contend that their proposed interpretation—that only obstructed views are prohibited—flows ineluctably from the statutory text. In reality, it is the petitioners' non-textual position that is the product of "after-the-fact" interpretation issued without "APA notice and comment" (Pet. 18). Furthermore, petitioners' reading of the regulation as prohibiting obstructed views necessarily agrees, at some level, with the Department's quite natural reading of "comparable" "lines of sight" as referring to the ability of a wheelchair user to view a performance. Petitioners do not dispute that the regulation prohibits a theater design where wheelchair users cannot view the movie because there are heads, headrests, or poles right in front of them. Petitioners simply disagree that the regulation also prohibits designs where wheelchair patrons cannot view the movie because the screen is right in front of them. That difference does not bespeak a fundamental divergence in the legal rules governing agencies' authority to interpret their own regulations; it is simply the byproduct of a case-specific disagreement about which forms of physical barriers to viewing a movie are covered by the regulation. That type of programmatic linedrawing does not present any broad legal question for this Court's review.

Petitioners' real complaint (Pet. 17-18) appears to be less with the Department's interpretation of its own regulation than with the Department's failure to provide prospective design specifications. But that objection does not bolster the basis for this Court's review. The meaning of "lines of sight" in the regulation never changed. The plain text of the regulation, industry practice, and petitioners' own reading of the regulation as prohibiting obstructions all indicate that, from the outset, "lines of sight" has encompassed patrons' ability to view the movie on the screen. What changed in the mid-1990s was not the regulatory interpretation, but the movie theaters' design. It was not until 1995 that movie theaters

first offered stadium-style seating and, as part of that development, began marketing to consumers the enhanced lines of sight that are the defining feature of stadium-style seating. With respect to most of the theaters at issue here, petitioners closed that new market to patrons with disabilities by completely excluding them from the sight-line benefits of the stadium-style design. It was against that backdrop that the Justice Department went on record, in its 1998 amicus brief in the *Lara* case, to make clear how the "comparable" "lines of sight" requirement in Standard 4.33.3 applies in the specific context of stadium-style movie theaters. But that does not mean that the underlying meaning of the regulation changed; it means only that a new opportunity for its application arose.

After all, while stadium-style seating was new to movie theaters, it was not new to stadiums and other assembly areas.[11] That application of extant regulatory standards and agency expertise to a specific factual scenario is what regulators routinely do; it is not an event that triggers the duty to engage in notice-and-comment rulemaking. And it is not the type of broad or enduring legal question that merits an exercise of this Court's certiorari jurisdiction, especially given that ten years have elapsed since stadium-style movie theatres first appeared and six years have now passed since the *Lara* brief was filed.[12]

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[11] See, *e.g.*, Letter from Merrily Friedlander, Acting Chief of the Coordination and Review Section, Civil Rights Div., Dep't of Justice, to Daniel L. Hesse, Director/Eng'r, Yakima County Public Works Dep't regarding Yakima County Stadium 3 (Nov. 21, 1994) ("'Line of sight' in an assembly area refers to both the ability to see performance areas and the angle from which performance areas are seen."), cited in *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 709 n.9 (D. Or. 1997).

[12] Petitioners wrongly assert (Pet. 7-8 & n.7) that the Department of Justice has repeatedly changed its interpretation of the comparable lines of sight requirement. Petitioners offer *no* evidence that the Department ever said that viewing angles are not an aspect of "lines of sight." And four courts have specifically found that the Department's interpretation

3. Lastly, petitioners' argument (Pet. 3, 26-29) that they lacked "fair notice" of the regulation's operation and that reading it to require retrofitting of petitioners' movie theaters (Pet. Reply 9) would violate due process does not merit this Court's review. The only thing the court of appeals decided was that petitioners' total exclusion of wheelchair patrons from stadium-style seating and relegation of wheelchairs to locations with the worst sight lines in the house violate the regulatory requirement that "lines of sight" be "comparable." As petitioners concede (Pet. 10), the issue of fair notice and the appropriate equitable remedy for that violation has not yet been decided in this case, or by any other appellate court in the country. Those issues will be addressed on remand. This Court rarely grants review of such interlocutory challenges.[13] Further, because "this is a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 399 (1996)), it would be inappropriate to litigate in this Court, for the first time, the fact-intensive and record-bound question of fair

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has been consistent. Pet. App. 10a-11a & n.5; *Cinemark*, 348 F.3d at 579; *United States* v. *Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 90 (D. Mass. 2003); *AMC Entm't*, 232 F. Supp. 2d at 1112-1113. Petitioners' further complaint (Pet. 17) that the Justice Department has not provided a single set of uniform "construction requirements" overlooks that the comparability of lines of sight is required only on a theater-by-theater basis. The view for wheelchair users need only be comparable to the view of other patrons in the same theater; it need not be as good a view as is offered in a different theater down the street. Furthermore, petitioners' central attack on the Department's interpretation has always been that it overreaches, not that it is insufficiently restrictive and regimented. In any event, that concern is expected to be resolved by the forthcoming regulatory amendments.

[13] See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J.) (denial of certiorari on interlocutory appeal), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review after final judgment).

notice, see *Meineker*, 69 Fed. Appx. at 25, or to attempt to outline in the abstract any possible limitations on purely hypothesized equitable relief.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] The dire remedial consequences that petitioners portend need never occur. See *Cinemark*, 348 F.3d at 582 n.10 (government's representation at oral argument that "the United States is not—has not and is not going to argue, for example, that the entire interior of the theater be gutted or torn down. We are going to work with the defendants to come up with a reasonable approach."); *Paralyzed Veterans*, 117 F.3d at 589 ("[T]here [is] a good deal of wiggle room in the degree of compliance contemplated by the regulation and manual, and * * * a judge sitting in equity[] ha[s] ample discretion to fashion the remedial order.").